

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 109.

JONAH KALANIANAOLE, PLAINTIFF IN ERROR,

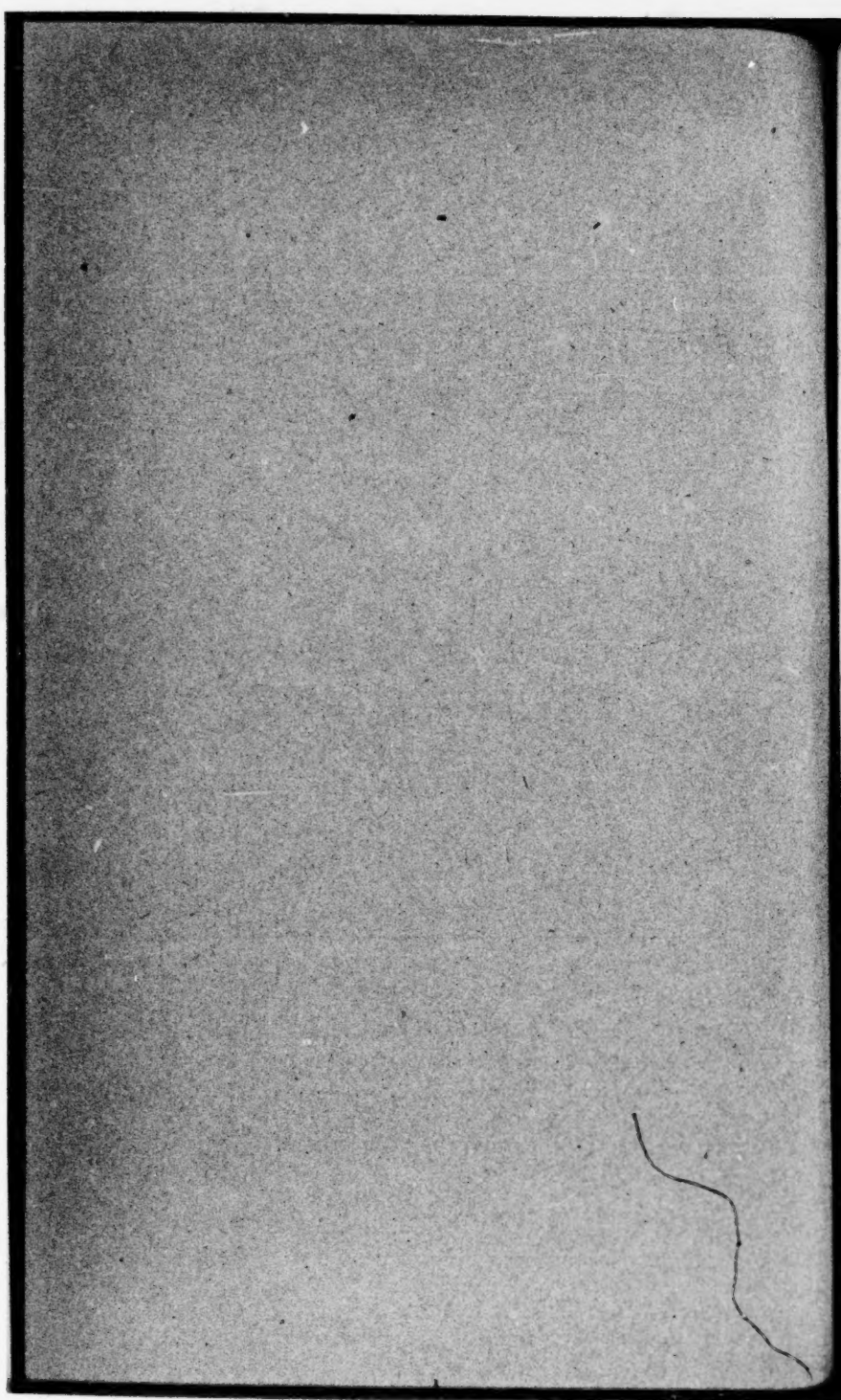
vs.

GEORGE E. SMITHIES, TRUSTEE OF STELLA KEOMAILANI COCKETT, AND STELLA K. COCKETT, BENEFICIARY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED JULY 21, 1910.

(22,272)



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LANI COCKETT, AND STELLA K. COCKETT, BENE-
FICIARY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

(\$2.00 Stamps.)

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Defendants in Error,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanānākoa,
Deceased, and JONAH KALANIANA'OLE, Plaintiff in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Hawaii:

The Petition of Jonah Kalaniana'ole, the Plaintiff in Error above named, respectfully shows unto this Honorable Court, as follows, to wit:

1. That on or about the 3rd day of August, 1909, there was filed and commenced in the Circuit Court for the First Circuit in and for said Territory, an action at law, wherein the Defendants in Error above named were and are the parties plaintiff, and John F. Colburn, as Executor under the Will of David Kawanānākoa, deceased, and your Petitioner herein, were and are the parties defendant, and that service in due form of law was made upon the said defendants therein, and they severally appeared and pleaded or (and) answered to said action.

2. That, upon the date last named, said John F. Colburn was the duly appointed, commissioned and acting Executor under the Will of said David Kawanānākoa, deceased, but that since said date, to wit, on or about the — day of February, 1910, and subsequent to the rendition of the judgment against this Petitioner, hereinafter complained of, he, the said John F. Colburn, having completed the probate proceedings upon and in respect of the Will and Estate of him, the said David Kawanānākoa, deceased, was, by due and regular order and decree of said Circuit Court, in Probate, discharged from his trust and office as such Executor, and that there has not since been, and is not now in existence, any legally appointed, qualified or acting executor of said Will, or other legal representative of the Estate of him, the said David Kawanānākoa, deceased.

3. That such proceedings were duly and regularly had in said action at law, that, on or about the 8th day of September, 1909, the said Circuit Court entered a judgment in said cause, in favor of said John F. Colburn, as such Executor as aforesaid, and against the parties plaintiff herein, a copy of which judgment is appended to the Assignment of Errors filed herewith, in this cause, and is

hereby especially referred to, incorporated into this petition, and made a part hereof.

4. That this Petitioner demurred to the Complaint of said parties plaintiff in said action, and, his said demurrer having been overruled by said Circuit Court, Petitioner thereafter, within the time permitted by said Circuit Court, answered to the merits of said Complaint and action; and thereafter, such proceedings were duly and regularly had in said Circuit Court, that said Circuit Court, on or about the 28th day of January, 1910, rendered and entered its judgment in said action against this Petitioner, and in favor of said parties plaintiff, wherein and whereby this Petitioner was and is adjudged to pay to said parties plaintiff a large sum of money, to wit, an aggregate of Six Thousand, One Hundred, Twelve and 15/100 Dollars, (\$6,112.15), including the costs of said action, therein taxed at \$26.00.

3 5. That said judgment against this Petitioner and in favor of said parties plaintiff, to wit, the Defendants in Error, herein, has not been reversed, suspended or set aside, but that the same still stands and obtains in full force; that less than six months have elapsed since said judgment was rendered and entered; and that the same is still wholly unpaid and unsatisfied.

6. That this Petitioner is aggrieved by said judgment against him, and is advised and believes, and upon such advice and belief he alleges, that said Circuit Court, in the course of the proceedings and action which led to, and which include said judgment, committed numerous errors of law and of fact, which were and are prejudicial to this Petitioner in the premises.

7. That Petitioner presents and files herewith his assignment of the errors which he conceives were committed by said Circuit Court in said action, to the prejudice of this Petitioner, and he has attached to said Assignments of Errors a copy of each and all of the pleadings in said action, and of the several Judgments rendered therein, and of the Decision and Order for Judgment rendered and made by said Circuit Court with respect to this Petitioner, and also with regard to Petitioner's co-defendant in said action; and of the Minutes of the Clerk of said Circuit Court taken and made in the course of said action, and the trial thereof; and of the transcript by the official stenographer of said Circuit Court, of the proceedings had, and objections and admissions made, and exceptions noted, upon the trial thereof; and Petitioner prays that all and singular the said copies aforesaid, and all and singular other, the Exhibits attached to his said Assignment of Errors herein, may be made a part of this petition, and considered in connection herewith.

Wherefore this petitioner prays that a Writ of Error may
4 issue out of this Court, addressed to the Clerk of the said Circuit Court for the First Circuit of said Territory, commanding him, the said Clerk to send up to this Honorable Court, all and singular the record in said described and mentioned action at law, to the end that the errors existing in said record may be corrected; and Petitioner further prays that said errors may be by this Hon-

orable Court corrected, and that full and complete justice may be done in the premises.

Dated this 14th day of March, 1910.

JONAH KALANIANA'OLE,

Petitioner,

(Sig.)

By C. W. ASHFORD,

His Attorney.

TERRITORY OF HAWAII,

City and County of Honolulu, ss:

C. W. Ashford, having been duly sworn, deposes and says that he verifies the foregoing Petition for and on behalf of the Petitioner therein named, for the reasons that said Petitioner is now absent from the Territory of Hawaii, upon public business, and that this deponent is familiar with all and singular the matters in said Petition mentioned and referred to. That deponent has read said Petition, and knows its contents, and that the matters therein alleged are true, of his own knowledge, except those matters that are therein alleged upon information, advice or belief, and as to those matters, he believes them to be true.

(Sig.)

C. W. ASHFORD.

Sworn to before me this 19th day of March, A. D. 1910.

(Sig.)

HENRY SMITH,

Clerk of the Judiciary Department,

Territory of Hawaii.

5 Endorsed: No. 490. Reg. 1/464. In the Supreme Court of the Territory of Hawaii. George E. Smithies, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, Defendants in Error, vs. John F. Colburn, Executor under the Will of David Kawanana'koa, deceased, and Jonah Kalaniana'ole, Plaintiff in Error. Petition for Writ of Error. Received \$25. Filed at 10:15 A. M. March 19, 1910. Henry Smith, Clerk. Clarence W. Ashford, Attorney for Petitioner.

6 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and STELLA K. COCKETT, Beneficiary, Defendants in Error,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa, Deceased, and JONAH KALANIANA'OLE, Plaintiff in Error.

Assignment of Errors.

The said Plaintiff in Error, Jonah Kalaniana'ole, hereby indicates and assigns the Errors of which he complains herein, as having been committed by the Circuit Court in the cause referred to in his

Petition for a Writ of Error herein, and upon which he relies in this cause—that is to say:

The Complaint (of which a copy marked Exhibit "A" of Record, is hereto attached and made a part hereof), was demurred to by said Defendants, who severed in their pleas.

The Demurrer of Defendant John F. Colburn, Executor under the Will of David Kawananakoa, Deceased (attached hereto by copy as Exhibit "B" of Record), was argued before the Court, submitted, and an Order (copy hereto attached as Exhibit "C" of Record) sustaining said Demurrer was signed and filed Sept. 3, 1909.

That thereafter, on Sept. 8th, 1909, Judgment was finally entered in favor of said Defendant John F. Colburn, Executor under the Will of David Kawananakoa, Deceased, whereof a copy is hereto attached, marked Exhibit "D" of Record, and made part hereof.

7 That the said Demurrer of Defendant Jonah Kalaniana'ole to said Complaint (whereof a copy, marked Exhibit "E" of Record, is hereto attached and made part hereof), was presented to the Court and argued together with that of said Defendant John F. Colburn, Executor under the Will of David Kawananakoa, Deceased, and was by the Court overruled, copy of the Minute-Order overruling the same, is hereto attached, as part of Exhibit "F" of Record, and made part hereof.

First Assignment of Error.

And, to the order of the Court in so overruling his said Demurrer to said Complaint, said Defendant Jonah Kalaniana'ole by his Counsel, then and there excepted, and he hereby assigns the same as error, as being error admitted by said Court, and prejudicial to said last named Defendant.

That thereafter, and within the time allowed him by the Court in that regard, said Defendant Jonah Kalaniana'ole filed and served herein his answer to said Complaint, which said answer is hereto attached as Exhibit "G" of Record, and made a part hereof.

That no order was at any time made in this cause striking from the record the name of said John F. Colburn, Executor under the Will of David Kawananakoa, Deceased, as a party Defendant herein, or otherwise or at all eliminating him from the record or dispensing with him as a party Defendant herein; but that, on the contrary, the name of said Defendant John F. Colburn as such Executor, was preserved in all respects, as that of a party to said action, until, and up to the point of the written Decision of the Court filed January 27, 1910, hereinafter specifically referred to; and that the name of said last named Defendant was then and therein, for the first time, omitted from the caption of the cause, and that said omission was repeated in the form of judgment entered January 28, 1910, hereinafter specifically referred to.

8 That said cause came on for trial, before the Honorable, the Second Judge of said Circuit Court, sitting, by consent of parties,

without a jury, on the 13th day of December, 1909, upon the record as it then stood, to wit, upon the complaint of Plaintiffs (which had not been amended in any particular after being first filed), the Judgment of September 8, 1909, in favor of Defendant John F. Colburn, Executor under the Will of David Kawanamaka, Deceased (Exhibit "D" of Record), and the said answer of Defendant Jonah Kalaniana'ole; and that upon such trial, proceedings were had, and objections offered, and overruled, exceptions noted and admissions of fact made, as per the Court minutes then and there taken by the Clerk and by him certified in a paper hereto attached, marked Exhibit "F" of Record, and made a part hereof; and as per the stenographic notes of said proceedings then taken by Gillson D. Bell, the official Stenographer, whose certified transcription of said Stenographic notes is hereto attached, marked Exhibit "H" of Record, and made a part hereof.

And, more specifically that said Defendant Jonah Kalaniana'ole upon said cause being called for trial, by his counsel, objected to the introduction of any evidence in support of said Complaint, upon the grounds set forth in said Exhibit "H" of Record.

Second Assignment of Error.

But the Court overruled said objections of said Defendant Jonah Kalaniana'ole, and ruled and ordered that evidence might and would be heard in support of said Complaint, to which said ruling and

Order of the Court, the said Defendant Jonah Kalaniana'ole by his counsel, then and — noted, and had allowed, an exception; and he now assigns the same as error upon the ground that the same constitutes error by said Circuit Court prejudicial to said last named Defendant in the premises.

And thereafter, upon said trial, said Defendant Jonah Kalaniana'ole by his counsel, saving the benefit of his exception to the ruling an order of the Court last aforesaid, admitted certain facts, set forth in said Complaint, the scope of said admission being set forth in said Exhibit "H" of Record.

Whereupon the said cause was taken under advisement by the Court.

That thereafter, the said Court filed its Decision in writing, upon and concerning the said cause, which said Decision, by copy, is hereto attached, marked Exhibit "J" of Record, and made a part hereof.

Third Assignment of Error.

To which said Decision of the Court, the said Defendant Jonah Kalaniana'ole excepted, and now assigns the same as error, upon the ground that the same does not conform to the requisites therefor prescribed by Section 1747 of the Revised Laws of Hawaii, as amended by Act 117 of the Session Laws of 1909; and upon the further ground that said Decision is contrary to the law, and also contrary to the facts involved in this action; and that the same con-

stitutes error by said Circuit Court, prejudicial to said Defendant Jonah Kalanianaole in the premises.

That thereafter on the 28th day of January, 1910, judgment was entered by said Court in said cause in pursuance of said decision, and of the order for judgment incorporated in said decision, to wit for the aggregate sum of Six Thousand One Hundred Twelve
10 15/100 Dollars (\$6,112.15). A copy of the said Judgment as so entered is hereto attached marked Exhibit "K" of Record, and made a part hereof.

Fourth Assignment of Error.

And to the entry of said judgment the said Defendant Jonah Kalanianaole by his counsel, duly excepted, and he hereby assigns the same as error, upon the ground that the same is contrary to law in the premises, and contrary to and unsupported by the evidence adduced and received in said cause; and that the same constitutes error by the said Circuit Court, prejudicial to said Defendant Jonah Kalanianaole — the premises.

Dated the 11th day of March, 1910.

(Sig.)

C. W. ASHFORD,

*Attorney for Plaintiff in Error,
Jonah Kalanianaole.*

Endorsed: No. 490. Reg. 1/464. In the Supreme Court of the Territory of Hawaii. George E. Smithies, Trustee of Stella Keomailani Cockett; and Stella K. Cockett, Beneficiary, Defendants in Error, vs. John F. Colburn, Executor under the Will of David Kawanakoa, deceased, and Jonah Kalanianaole, Plaintiff in Error. Assignment of Errors. Filed at 10:15 a. m. March 19, 1910. Henry Smith, Clerk. Clarence W. Ashford, Attorney for Plaintiff in Error.

11 (\$1.00 Stamp.)

Know all men by these presents, that we, Jonah Kalanianaole, of the City of Honolulu, in the Territory of Hawaii, as Principal, and William A. Kinney & John F. Colburn as Sureties, of said Honolulu, are held and firmly bound unto George E. Smithies (Trustee of Stella Keomailani Cockett), and Stella Keomailani Cockett, both of said Honolulu, in the sum of six thousand, five hundred dollars (\$6,500.00), to the payment whereof, well and truly to be made, we do hereby firmly bind ourselves, and our respective heirs, executors and administrators;

The condition of this obligation is as follows, that is to say:

Whereas, in the Circuit Court for the First Circuit of said Territory, on the 28th day of January, 1910, in a certain action at law then and there and therein pending, wherein the above named obligees were parties plaintiff, and the above named Principal, and John F. Colburn (as Executor under the Will of David Kawanakoa, deceased), were parties defendant,—a judgment was rendered and entered in favor of the plaintiffs therein, and against the

above named Principal, as such defendant, for the sum of six thousand, one hundred and twelve, 15 100 Dollars, (\$6,112.15), or thereabouts, which judgment still stands unreversed and unsatisfied; and

Whereas said Principal has sued out, or is about to sue out, from the Supreme Court of said Territory to said Circuit Court for said First Circuit inereof, a Writ of Error, for the purpose of securing a review by said Supreme Court of the record of said Circuit Court in the premises, and for the correction of any errors therein;

Now, therefore, if said bounded Principal shall well and truly pay said Judgment, so rendered and entered against him, in the event that he shall fail to sustain such Writ of Error,—& all costs of Court now or hereafter incurred then this Obligation shall be void,—otherwise of full force and effect.

In witness whereof, the said Principal, and the said Sureties have hereunto set their hands and seals, at said Honolulu, this 14th day of March, 1910.

JONAH KALANIANA'OLE,

By His Attorney in Fact, W. A. KINNEY.

W. A. KINNEY.

JOHN F. COLBURN.

Endorsed: 1129. In the Supreme Court of the Territory of Hawaii. George E. Smithies, et al., Defendants in Error, vs. John F. Colburn, Executor, etc., and Jonah Kalaniana'ole, Plaintiff in Error. Bond, on Application for Writ of Error. Filed March 19, 1910. Henry Smith, Clerk. Clarence W. Ashford, Attorney for Plaintiff in Error.

13 In the Supreme Court of the Territory of Hawaii, October Term, 1910.

(\$2.00 Stamps.)

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and STELLA K. COCKETT, Beneficiary, Defendants in Error,

v.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa, Deceased, and JONAH KALANIANA'OLE, Plaintiff in Error.

Writ of Error.

The Territory of Hawaii to John Marcallino, Esquire, Clerk Circuit Court, First Circuit:

Whereas, in an action lately pending before the Circuit Court of the First Circuit, in which the said George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, were plaintiff and the said John F. Colburn, Executor under the Will of David Kawanana'koa, and Jonah Kalaniana'ole, were defendants, error is alleged to have occurred as appears by the assignment of

errors on file in this Court, you are commanded forthwith to send up to this Court the record and the exhibits filed in said proceedings.

Witness, the Hon. Alfred S. Hartwell, Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, this 19th day of March, 1910.

By the Court:

[SEAL.]

(Signed)

HENRY SMITH,

Clerk Supreme Court.

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above mentioned cause.

Dated ———, 190—. Clerk Circuit Court, ——— Circuit.

14 Endorsed: No. 490. Reg. 1-464. Supreme Court Territory of Hawaii. George E. Smithies, Trustee of Stella Keomailani Cockett; and Stella K. Cockett, Beneficiary, Defendants in Error, v. John F. Colburn, Executor under the Will of David Kawanamako, Deceased, and Jonah Kalaniana'ole, Plaintiff in Error. Writ of Error. Issued at 10:15 o'clock a. m. Mar. 19, 1910. Henry Smith, Clerk. Returned at 2:35 o'clock P. M. March 29, 1910. J. A. Thompson, Clerk. Clarence W. Ashford, Attorney for Plaintiff in Error.

15 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanamako,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Return to Writ of Error.

In obedience to the foregoing Writ of Error which was issued out of the Supreme Court of the Territory of Hawaii on the 19th day of March, A. D. 1910, in the above entitled cause, and to me directed, I, John Marcallino, Clerk of the Circuit Court of the First Judicial Circuit of said Territory, do transmit herewith to said Supreme Court a full and complete transcript of the record in said cause, said transcript consisting of true and correct copies of the documents, records and files which are more specifically set forth in my certificate appended to said transcript of record and which is made a part of this return.

Witness my hand and the Seal of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Honolulu, City and County of Honolulu, this 29th day of March, A. D. 1910.

[SEAL.]

(Signed)

JOHN MARCALLINO.

Endorsed: Filed March 29, 1910, at 2:35 o'clock P. M. J. A. Thompson, Clerk.

16 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

(\$2.00 Stamps.)

Law—Civil No. —.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Complaint.

Come now George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, hereinafter called the Plaintiffs, and complaining of John F. Colburn, Executor of the Will of David Kawanana'koa, Deceased, and Jonah Kalaniana'ole, hereinafter called the defendants, and allege:

1. That on or about the fifth day of September, A. D. 1888, the Plaintiff, Stella Keomailani Cockett, whose maiden name was then Stella Keomailani, made, executed and delivered a deed of trust conveying to one Alexander J. Cartwright certain real and personal property in trust for the said Grantor and her heirs, upon conditions in said deed set forth and declared.

2. That thereafter, said Trustee, the said Alexander J. Cartwright, died, leaving said trusteeship vacant, whereupon one Ellen Albertina Polyblank, otherwise known as Sister Albertina, was, by order of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, duly appointed as such Trustee under said
17 deed of trust, and accepted said trust, and entered upon the duties of executing the same.

3. That thereafter, David Kawanana'koa and Jonah Kalaniana'ole became indebted to said trustee and to said trust estate in the sum of Eight Thousand (\$8,000) Dollars, to secure the payment of which the said David Kawanana'koa and Jonah Kalaniana'ole made, executed and delivered to the said Ellen Albertina Polyblank, as such trustee, their certain promissory note, dated on or about June 25th, 1903, for the sum of Eight Thousand (\$8,000) Dollars, with interest thereon from said date at the rate of seven (7) per cent per annum, secured by mortgage upon certain real estate. That thereafter, the said mortgage indebtedness being and remaining unpaid, and the said mortgagors being in default in that said mortgage indebtedness was past due and wholly unpaid, the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, joining the Plaintiff, Stella Keomailani Cockett, with her as Plaintiff, commenced an equitable action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the purpose of foreclosing the said mortgage, selling the said mortgaged premises and obtaining a deficiency judgment for any balance that might remain upon said mortgage in—

debtedness after selling said mortgaged premises, paying the costs and expenses of suit and of sale or sales of said premises, and applying the proceeds of such sale or sales to the payment, so far as it would, of said mortgage indebtedness; and, in said suit such proceedings were had, that the said Plaintiffs obtained, and the said Circuit Court duly made, rendered and entered its interlocutory decree, ordering and directing its Commissioner, M. T. Simonton, to sell the said mortgaged premises, after advertising the time terms and place of sale thereof; applying the proceeds of such sale first to the

costs and expenses of making such sale or sales, the remainder
18 of such proceeds to be applied upon the said mortgage indebtedness, which interlocutory *decree* was duly made and entered in said Circuit Court on the fifth day of May, A. D. 1905; that thereafter, by due proceedings had by the said Defendants in the said equitable action, the said Defendants, the said David Kawanakoa and Jonah Kalaniana'ole, appealed to the Supreme Court of the Territory of Hawaii from said interlocutory decree, which appeal was duly heard in and by the said Supreme Court of the Territory of Hawaii, and said Supreme Court, after hearing said appeal, and having duly and fully considered the same, made and rendered its decision and judgment, fully affirming said interlocutory decree; that thereafter, the said Defendants sued out a writ of error from said Supreme Court of the Territory of Hawaii to the Supreme Court of the United States for the purpose of having said interlocutory decree reviewed in and by the Supreme Court of the United States, in which proceeding such actions were had and taken that the Supreme Court of the United States did review the said interlocutory decree and said equitable action, and the same having been duly argued and submitted to the said Supreme Court of the United States for decision, the said Court being sufficiently advised, did make and render its decision and judgment on the eighth day of April, A. D. 1907, affirming said interlocutory decree in all respects.

4. That thereafter, the said Commissioner proceeded to and did comply with the requirements and directions in said interlocutory decree contained, and did, after advertisement, proceed to and did sell the said mortgaged premises directed to be sold under said decree, realizing therefor the aggregate sum of Five Thousand Seven Hundred and Fifty (5,750) Dollars, out of which the costs and expenses of making such sales, advertising them, etc., and a fee of Two

Hundred (200) Dollars allowed the said Commissioner were
19 paid, and the remainder, to wit: the sum of Four Thousand Nine Hundred Eighty Seven and 25/100 (4,987.25) Dollars, was applied upon said mortgage indebtedness, leaving a deficiency thereon of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars due and unpaid upon said mortgage indebtedness. That thereupon and thereafter, the said Commissioner, M. T. Simonton, made his return of such sales to the said Circuit Court, showing all of his actions and doings in the premises, and showing such deficiency and the amount thereof, and thereafter, on the twelfth day of December, A. D. 1907, the said Circuit Court made,

and on the thirteenth day of December, A. D. 1907, filed and entered its final decree fully confirming and ratifying all of the acts of the said Commissioner, confirming the said sales, determining the amount of costs and expenses, the amount applicable from the proceeds of said sales thereto, and said final decree did order judgment gage indebtedness, and determining the amount of deficiency of said mortgage indebtedness left unpaid after applying the said proceeds of said sales thereto, and said final decree did order judgment entered in favor of the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee as aforesaid, and said Stella K. Cockett, Beneficiary, for said deficiency, in the sum of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars, with interest thereon from the thirteenth day of July, A. D. 1907, at the rate of six (6) per cent per annum; and thereafter, the said Defendants, David Kawanauakoa and Jonah Kalaniana'ole, did appeal the said cause and take and appeal from the said final decree so made, rendered and entered in the said cause from said Circuit Court to the said Supreme Court of the Territory of Hawaii; and thereafter the said appeal was by the said Supreme Court dismissed for want of prosecution on the part of the said Appellants, in that

20 said Appellants failed to file briefs on said appeal; and the said final decree is and at all times has been in full force and effect; that on the fifteenth day of May, A. D. 1909, the Clerk of said Circuit Court, pursuant to the directions of the said Circuit Court in said final decree contained, duly entered judgment in favor of the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee as aforesaid, and said Stella K. Cockett, Beneficiary, against the said Defendants therein, the said David Kawanauakoa and Jonah Kalaniana'ole, for the said sum of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars, with interest thereon from the thirteenth day of July, A. D. 1907, at the rate of six (6) per cent per annum.

5. That during the year 1908 said Ellen Albertina Polyblank resigned as such Trustee, and Plaintiff, George E. Smithies, was, by order of said Circuit Court duly made, appointed as Trustee under said Deed of Trust, accepted such trust and duly entered upon the duties thereof, and has at all times since been, and now is, the duly appointed and acting trustee under said deed.

6. That the said David Kawanauakoa died, testate, on the fourth day of June, A. D. 1908, being at the time domiciled at Honolulu, in the said Territory of Hawaii, and leaving an estate therein; and thereafter, the last will and testament of the said David Kawanauakoa, deceased, was duly probated in the said Circuit Court, and the said John F. Colburn, Defendant herein, was appointed as Executor of the said will of said decedent, and accepted the said trust, and duly qualified as such Executor on or about the first day of December, A. D. 1908, and entered upon the duties of such trust, and at all times since the said first day of December, A. D. 1908, the said Defendant, John F. Colburn has been, and now is, the duly appointed and acting Executor of said will of said decedent.

7. That the said claim and deficiency judgment was duly assigned by the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, as such Trustee, to the Plaintiff, George E. Smithies, Trustee as aforesaid.

8. That a claim in writing, duly verified by the oath of the Plaintiff, George E. Smithies, Trustee as aforesaid, was presented to the Defendant, John F. Colburn, Executor of the will of David Kawanakoa, deceased, on the seventeenth day of May, A. D. 1909, presenting the claim of the Plaintiffs herein for the sum of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars, with interest thereon at six (6) per cent per annum from the thirteenth day of July, A. D. 1907, based upon said deficiency judgment and amount due upon said former mortgage indebtedness, to which claim was attached, as parts thereof, a copy of said final decree, a copy of said assignment from said Ellen Albertina Polyblank, otherwise known as Sister Albertina, to the Plaintiff, George E. Smithies, Trustee, and a copy of said deficiency judgment. The said claim, as so presented, with the said exhibits thereto attached, are hereto attached, as a part of this complaint, and made a part hereof as fully as if the same were fully set forth herein, and marked "Exhibit A."

9. That the Defendant, John F. Colburn, immediately after his qualification as such executor, gave and published to creditors of the Estate of the said David Kawanakoa, deceased, notice to present their claims against the said estate to the said executor, for allowance or rejection, which notice was first published on the first day of December, A. D. 1908, as Plaintiffs are informed, believe and therefore aver.

10. That thereafter, and on the twenty ninth day of May, A. D. 1909, the said Defendant, John F. Colburn, executor as aforesaid, without any reason or excuse therefor, arbitrarily rejected the said claim and all thereof.

11. That the said claim as past due and wholly unpaid, and the said deficiency judgment and the indebtedness thereon due, and all thereof, is wholly unpaid.

Wherefore Plaintiffs pray the process of this Honorable Court to cite the said Defendants to answer this, the Plaintiffs', complaint, before a jury of the country, at the term thereof immediately after the expiration of twenty (20) days after the service thereof; Provided, however, if no term is pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, unless otherwise sooner disposed of by judicial authority; and that Plaintiffs may have judgment against the said Defendants for the sum of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars, with interest thereon from the thirteenth day of July, A. D. 1907, at the rate of six (6) per cent per annum, cost of suit in this action incurred and expended, and for all proper relief.

GEORGE E. SMITHIES,
Trustee of Stella Keomailani Cockett;
STELLA K. COCKETT,
By ATKINSON & QUARLES,
Attorneys for Plaintiffs.

TERRITORY OF HAWAII,
First Judicial Circuit, ss:

George E. Smithies, being first duly sworn, deposes and says: I am, as Trustee under that certain Trust Deed mentioned in the foregoing complaint of the Plaintiffs, one of the Plaintiffs in the foregoing entitled action; I have read the above and foregoing complaint and know the contents thereof, and the same is true of my own knowledge except as to the matters and things therein stated to be upon information and belief, and as to those matters I believe it to be true.

GEORGE E. SMITHIES.

Subscribed and sworn to before me this 3rd day of August, 1909.
[SEAL.] J. J. MACGARVEY,
Notary Public, First Judicial Circuit.

ATKINSON & QUARLES,
303 Judd Building, Attorneys for Plaintiffs.

24 EXHIBIT A.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Probate.

(Copy.)

In the Matter of the Estate of DAVID KAWANANAKOA, Deceased.

Creditors' Claim.

Estate of David Kawananaokoa, Deceased, and Jonah Kalaniana'ole to George E. Smithies, Trustee of Stella Keomailani, and Stella K. Cockett, Beneficiary, Dr.

1907, December 12.

To deficiency judgment rendered in the action wherein Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said trust, were Complainants, and David Kawananaokoa, deceased, Jonah Kalaniana'ole, Abigail W. Kawananaokoa, Elizabeth K. Kalaniana'ole and the German Savings & Loan Society, a corporation, Respondents, for the amount of deficiency after sale of mortgaged property, which deficiency judgment was ordered entered by the Clerk of the above entitled Court, by order contained in final decree dated December twelfth (12) 1907, filed December thirteenth (13th), 1907, copy of which final decree and copy of said deficiency judgment are hereto attached as parts

25 hereof \$5,280.75

To interest on same from July 13th, 1907, at 6 per cent per annum, . . .

TERRITORY OF HAWAII,

First Judicial Circuit, ss:

George E. Smithies, being first duly sworn, deposes and says:

I am Trustee of Stella K. Cockett under deed of trust heretofore made and executed by her, having been appointed such Trustee by order of Court duly made by the Circuit Court of the First Judicial Circuit, Territory of Hawaii; that the claim hereto attached due upon deficiency judgment in the sum of Five Thousand Two Hundred Eighty $75/100$ (5,280.75) Dollars, with interest thereon at the rate of six (6) per cent per annum from the thirteenth (13th) day of July, A. D. 1907, is past due and wholly unpaid; that there are no credits or offsets against the same; that this affidavit is made on behalf of the affiant as such Trustee, and on behalf of Stella K. Cockett as beneficiary under said trust.

GEORGE E. SMITHIES.

Subscribed and sworn to before me this seventeenth day of May, A. D. 1909.

[NOTARIAL SEAL.]

J. J. MACGARVEY,
*Notary Public, First Judicial Circuit,
Territory of Hawaii.*

26

(Copy.)

I, Ellen Albertina Polyblank, otherwise known as Sister Albertina, mentioned in the judgment, certified copy of which is hereto attached, as Trustee for Stella Keomailani Cockett, for value received, do, insofar as I am authorized so to do, and without recourse on me personally, hereby assign, set over and transfer to George E. Smithies, Trustee for said Stella Keomailani Cockett, the said judgment, the same being a deficiency judgment against David Kawanakoa, now dead, and Jonah Kalanianaole, for the sum of Five Thousand Two Hundred Eighty and Seventy-Five Hundredths Dollars, (\$5,280.75) with interest at the rate of six (6) per cent per annum from July thirteenth (13th) 1907.

ELLEN ALBERTINA POLYBLANK,

Sister Albertina.

Dated this May fifth, 1909.

27 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

(Copy.)

ELLEN ALBERTINA POLYBLANK, Otherwise Known as Sister Albertina, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANAKOA, Elizabeth K. Kalanianaole, and the German Savings & Loan Society, a Corporation, Respondents.

Foreclosure of Mortgage.

Final Decree.

Whereas, heretofore and on to wit: the 5th day of May, A. D. 1905, upon bill of complaint of complainants herein filed on the 26th day of September, A. D. 1904, the Amended Answer of the respondents David Kawanakoa, Jonah Kalanianaole, Abigail W. Kawanakoa and Elizabeth K. Kalanianaole, filed herein on the 16th day of February, A. D. 1905, the answer of the respondent corporation, the German Savings & Loan Society, filed herein on the 3rd day of December, A. D. 1904, the Territory of Hawaii having theretofore and on to wit: the 8th day of December, A. D. 1904, upon motion of complainants, been dismissed as a party respondent herein, and evidence both oral and documentary, adduced by the parties hereto, upon the hearing hereof, there was duly entered and filed herein an interlocutory decree of foreclosure in favor of the complainants and against the respondents David Kawanakoa, Jonah Kalanianaole, Abigail W. Kawanakoa, Elizabeth Kalanianaole and the German Savings & Loan Society, a corporation, wherein it was found and therein adjudged and decreed that there was then due and owing complainants by the respondents David Kawanakoa and Jonah Kalanianaole upon the promissory note and mortgage sued upon in this action the sum of Eight Thousand (8000) Dollars together with interest thereon at the rate of seven per cent (7%) per annum from the 25th day of June, A. D. 1903, and that the respondents David Kawanakoa and Jonah Kalanianaole were personally liable for the whole amount thereof; that there was also due complainants from the respondents David Kawanakoa and Jonah Kalanianaole, the sum of Forty-Four and 50/100 (44.50) Dollars, as and for costs and expenses theretofore incurred by the complainants herein; that the said sum of Eight Thousand (8000) Dollars, together with interest thereon at the rate of seven per cent (7%) per annum from the said 25th day of June, A. D. 1903, amounting to Nine Thousand Forty-Two and 10/100 (9,042.10) Dollars, together constituted a valid first lien upon the land and premises mentioned in complainants' bill of

complaint and said interlocutory decree of foreclosure, particularly described and set forth and was secured by the mortgage mentioned and set forth in said complaint; that each and all the terms and conditions of said mortgage had been broken by said respondents

29 ents David Kawanakoa and Jonah Kalanianaole; that for conditions of said mortgage broken by said respondents David Kawanakoa and Jonah Kalanianaole, the complainants were entitled to have said mortgage enforced and foreclosed and the land and premises set forth and described therein, sold in the manner prescribed by law, and the proceeds arising from such sale applied to and upon the payment of said sum of money so due as aforesaid; that the respondent, the German Savings & Loan Society, a corporation, subsequent to the execution and delivery of the note and mortgage set forth in complainant's bill of complaint herein, became, and was a secondary incumbrancer upon a portion of the said land and premises subject to said mortgage of respondents and David Kawanakoa, Jonah Kalanianaole, Elizabeth K. Kalanianaole and Abigail W. Kawanakoa, to wit:

That certain lot, piece, parcel or tract of land more particularly bounded and described as follows, to wit:

All that portion of Royal Patent No. 4371, L. C. A. 7260, to B. Namakeha, at Kaalaa, Pauoa, Honolulu, Oahu, bounded and described as follows:

Beginning at the west corner of this land on Pauoa Road, the same being the North corner of L. C. A. 5957 B. Apana 3 to Kaholoau, and running by true meridian:

S. 84° 50' E. 107.4 feet along Pauoa Road;

S. 88° 40' 54.0 feet along same;

N. 88° 30' E. 80.5 feet along same;

S. 24° 45' E. 52.0 feet along same;

N. 54° 20' W. 13.0 feet along same;

S. 00° 55' E. 222.3 feet along same;

S. 5° 00' E. 103.0 feet along same;

S. 55° 18' W. 23.0 feet along L. C. A. 236 to Kaholo;

N. 5° 05' W. 36.0 feet along remainder of this land;

S. 84° 12' W. 180.8 feet along stone wall;

N. 12° 07' E. 183.0 feet along L. C. A. 5957 B. Apana 4 to Kaholoau;

30 N. 70° 35' 125.0 feet along same;

N. 9° 20' E. 171.5 feet along L. C. A. 5957 B. Apana 3 to Kaholoau to the initial point, and containing an area of 1 95/100 acres.

But the lien of the said German Savings & Loan Society, a corporation, was subordinate and subject to the lien of complainants thereon; and did further order adjudge and decree that the said premises under second mortgage to the said German Savings & Loan Society, a corporation, should not be sold, unless the amount received and obtained from the sale of the balance of the land and premises, exclusive of that portion so subject to second mortgage to the said German Savings & Loan Society should be insufficient and inadequate to satisfy the judgement in said decree of foreclosure con-

tained, and in case the amount realized or obtained from such sale as aforesaid should be insufficient to satisfy the said judgement, then the commissioner thereafter named was thereby ordered to expose and offer for sale at public auction, upon the same terms thereafter set forth, the said land and premises so thereinbefore described, under second mortgage to said respondent The German Savings & Loan Society, a corporation, to satisfy the said judgement aforesaid; and that M. T. Simonton be and he was therein and thereby appointed the commissioner, upon qualifying and upon giving notice of the time and place thereof to make sale of all and singular the said mortgaged premises or so much thereof as may be sufficient to raise the amount due to the complainants for the principal and interest and costs of suit and expenses of sale; with

- power and authority, upon report thereof and confirmation
- 31 of sale to execute a deed to the purchaser or purchasers thereof, free and clear of all incumbrances or liens thereon, and from the proceeds of such sale after retaining his fees and commissions, to pay to Henry Smith, Esq., Clerk of the Judiciary Department of the Territory of Hawaii, subject to the order of court, the sum of Forty-Four and 50/100 (44.50) Dollars, costs of this suit, also the further sum of Eight Thousand (8,000) Dollars, and interest thereon, at the rate of seven per cent (7%) per annum, from the 25th day of June, A. D. 1903, up to and including the date of sale of the land and premises under said decree to be sold as therein set forth, or so much thereof as the said proceeds of sale would pay of the same and any over plus after the principal of the note sued upon, together with all costs and interest therein shall have been deducted, to be turned over and delivered to the respondents David Kawanakoa, Jonah Kalaniana'ole, Abigail Kawanakoa, Elizabeth Kalaniana'ole and the German Savings & Loan Society, a corporation, and all persons claiming or to claim from or under them, and all persons having liens or a lien subsequent to said mortgage by judgement or decree upon the land and premises therein described and their personal representatives and all persons having any lien or claim by or under such subsequent judgement or decree and their heirs or personal representatives and all persons claiming to have acquired any share or interest in said land or premises, be and they were thereby forever barred and foreclosed of and from all claim, right interest, lien, incumbrance and equity of redemption in and to said mortgaged premises therein set forth and described.
- 32 and every part and parcel thereof from and after the delivery of said commissioner's deed; and that if the moneys arising from the said sale should be insufficient to pay the amount so found due the complainants with interest and costs and expenses of sale, the commissioner should specify in his report the amount of such sale and that on the coming in and filing of said return, the clerk of this court should docket a judgement for such balance against the respondents David Kawanakoa and Jonah Kalaniana'ole and that the respondents David Kawanakoa and Jonah Kalaniana'ole pay to the said complainants the amount of said

deficiency and judgement with interest thereon at the rate of six per cent (6%) per annum from the date of said last mentioned return and judgement and that the complainants have execution therefor;

And whereas, on the 16th day of July, A. D. 1907, the said M. T. Simonton, the said commissioner appointed by the said interlocutory decree to sell the said mortgaged premises, did report in writing to the undersigned as said third judge of the above named court, in chambers, the sale of all the said premises in said decree described, one part or portion thereof to one Edgar Henriques, for the sum of five thousand (5,000) Dollars, and the other part or portion thereof to T. R. Mossman, for the sum of two thousand seven hundred seventy-five (2,275) Dollars, but that the said T. R. Mossman had neglected and refused to complete said sale to him by the payment of the deposit or purchase price thereof, and upon other and further proceedings had in that behalf thereafter and on to wit: the 19th day of July, A. D. 1907, the undersigned as said third judge at

chambers, did duly and regularly approve and confirm the
33 report of said commissioner so far as the sale of the land and premises described in said return to have been sold to the said Edgar Henriques, was concerned and did authorize and direct the commissioner to execute to the said Edgar Henriques, upon the payment of the amount bid by him to wit: the sum of Five Thousand (5000) Dollars, a good and sufficient deed therefor, and did vacate and set aside and hold at nought the said so called sale to the said T. R. Mossman and did order that the remainder of the said premises be sold by said commissioner at a time and place certain, upon advertisement thereof made;

And whereas, on the 22nd day of July, A. D. 1907, said M. T. Simonton, as said Commissioner, did file and enter herein his certain return of sale, and account of sales, wherein and whereby he did report the sale of the said remaining premises for the sum of Seven Hundred Fifty (750) Dollars to one Edgar Henriques, and on sales thereof;

And whereas, thereafter and on to wit: the 1st day of August, A. D. 1907, the undersigned as said third judge, did duly and regularly confirm said resale and did order that the return and account of sale of the said M. T. Simonton as said commissioner be and the same was thereby approved and confirmed and the said commissioner was ordered and directed to execute and deliver a deed to and for the land and premises described in said return to the said Edgar Henriques upon the payment by him of the sum of Seven Hundred Fifty (750) Dollars.

And whereas, it appears that the interlocutory decree of foreclosure and sale has in all respects been complied with by said commissioner, and it further appearing to me that the amount due to the complainants herein, up to the date of the first sale, to
34 wit: the 13th day of July, A. D. 1907, amounts to the sum of Ten Thousand Two Hundred Sixty-Eight (10,268) Dollars, and that the net proceeds of sales after deducting all costs of sales and advertising, but exclusive of commissioner's fee, amounts

to the sum of Five Thousand One Hundred Eighty-Seven and 25/100 (5,187.25) Dollars.

It is hereby ordered, adjudged and decreed.

1. That in accordance with said orders of the 19th day of July, A. D. 1907, and the 1st day of August, A. D. 1907, the commissioner's sales to Edgar Henriques be and the same are hereby in all things ratified and confirmed.

2. That in accordance with the said orders of the 19th day of July, A. D. 1907, and the 1st day of August, A. D. 1907, the sales wherein and whereby was sold the following described premises:

All and singular the lands and premises situate in Kaalaa, Pauoa, Honolulu aforesaid, more particularly bounded and described as follows, to wit:

A portion of Kaalaaluna, Honolulu, Kona, Oahu, L. A. Award 7260 to B. Namakeha.

Beginning on the new south line of Pauoa Road on the East Boundary of L. C. A. 5957 B. to Kaholoan, said point being 193.5 feet from the intersection of the new South line of Pauoa Road and Nuuanu Avenue, as shown on Government Registered Map No. 2004 and running by true azimuths:

1. 270° 00' 30" 441.1 feet along new South line of Pauoa Road
2. 338° 48' 241.0 feet along Ulu's Place;
3. 58° 10' 216.5 feet along L. C. A. 85 FL. and 6059
4. 56° 15' 125.0 feet along L. C. A. 236
5. 62° 05' 82.6 feet along same;
6. 74° 10' 112.0 feet along same;
7. 179° 28' 9.8 feet along L. C. A. 11,144 B. Ap. 2;
8. 86° 50' 52.8 feet along same;
9. 147° 33' 71.3 feet along same
10. 45° 10' 61.0 feet along same;
11. 138° 38' 160.3 feet along same;
- 35 12. 45° 27' 6.0 feet along same;
13. 154° 15' 9.5 feet along Kaalaalalo;
14. 223° 10' 110.5 feet along same;
15. 259° 17' 9.7 feet along same;
16. 223° 00' 117.5 feet along same;
17. 118° 00' 65.0 feet along same;
18. 189° 51' 95.2 feet along L. C. A. 5957 to point of beginning.

Area 5.17 Acres.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining; to Edgar Henriques for the aggregate sum of Five Thousand Seven Hundred Fifty (5,750) Dollars, he and the same are hereby respectively ratified and confirmed and the said commissioner is hereby ordered and directed to make and execute good and sufficient deed or deeds of conveyance of said premises to the said Edgar Henriques.

3. That the said M. T. Simonton be and he is hereby allowed the sum of Two Hundred (200) Dollars in full compensation for his services as said commissioner.

4. That out of the sum of Five Thousand Seven Hundred Fifty

(5,750) Dollars, the total of the prices of the property so sold, the commissioner do pay (a) the costs of the court incurred in these foreclosure proceedings amounting to Forty-Four and 50/100 (44.50) Dollars; (b) the expenses of sale to wit: the sum of Five Hundred Eighteen and 25/100 Dollars; and (c) the sum of **Two Hundred** (200) Dollars to himself for his services as such commissioner.

5. That the commissioner do pay to the complainants herein, the sum of Four Thousand Nine Hundred Eighty-Seven and 25/100 (4,987.25) Dollars, being the balance of the said sum of Five Thousand Seven Hundred Fifty (5,750) Dollars.

And it is further ordered, adjudged and decreed, that after the payment of the said sum of Four Thousand Nine Hundred
36 Eighty-Seven and 25/100 (4,987.25) Dollars to the complainants there was due and owing to them on the said 13th day of July, A. D. 1907, the sum of Five Thousand Two Hundred Eighty and 75/100 (5,280.75) Dollars, being the balance of said sum of Ten Thousand Two Hundred Sixty-Eight (10,268) Dollars due to the complainants on said date; and that the clerk of this court do enter and docket a judgement against the said respondents David Kawanana'ole and Jonah Kalaniana'ole in favor of complainants, for the said sum of Five Thousand Two Hundred Eighty and 75/100 Dollars, together with interest at the rate of six per cent (6%) per annum from said 13th day of July, A. D. 1907, and that the complainants have execution therefor.

Done at Chambers, this 12th day of December, A. D. 1907.

(Signed)

W. J. ROBINSON,

Third Judge of the Circuit Court,

Third Circuit.

Approved as to form, but reserving right of objection to descriptions of parcels ordered to be sold, and sold, and as to computations of interest.

December 13th, 1907.

(Signed)

C. W. ASHFORD,

Att'y for Certain Defendants.

(Signed)

SMITH & LEWIS,

Att'ys for the German Savings & Loan Society.

Endorsed: Service of a copy of the within decree is hereby admitted this 13th day of December, A. D. 1907. (Signed) C. W. Ashford, Attorney for certain Defendants. (Signed) Smith & Lewis, Attorneys for the German Savings & Loan Society.

Endorsed: Eq. 1431 Reg. 1, 194 (Original) Circuit Court 1st Circuit. Polyblank, et al. vs. Kawanana'ole, et al. Final Decree. Filed December 13, 1907, at 2:05 o'clock p. m. Wm. S. Chillingworth, Ass't Clerk.

37 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

ELLEN ALBERTINA POLYBANK, Otherwise Known as Sister Albertina, Trustee for Stella Keomailani Cockett, and STELLA K. COCKETT, Sole Beneficiary under said Trust, Complainants,

vs.

DAVID KAWANANAKOA, JONAH KALANIANA'OLE, ABIGAIL W. KAWANAKOA, Elizabeth K. Kalaniana'ole and the German Savings & Loan Society, a Corporation, Respondents.

Deficiency Judgment.

Whereas, on the twelfth day of December, A. D. 1907, final decree confirming sales made by this Court's Commissioner in the above entitled action ascertaining the amount of such sales, the costs and expenses of making the same, the amount of credits from the net proceeds of the said sales to be applied upon the mortgage set forth in the bill of the Complainants in this cause, and ascertaining the amount due upon said mortgage indebtedness after applying such credits did direct the Clerk of this Court to enter in docket a judgment against the Respondents, David Kawanakoa and Jonah Kalaniana'ole in favor of the Complainants, for the sum of Five Thousand Two Hundred Eighty 75 155 (5,280.75) Dollars, together with interest at the rate of Six (6) per cent per annum from the Thirteenth (13th) day of July, A. D. 1907;

38 Therefore, it is adjudged that the Complainants, Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said trust, do have and recover of and from the respondents, David Kawanakoa and Jonah Kalaniana'ole, the sum of Five Thousand Two Hundred Eighty 75 100 (5,280.75) Dollars, with interest thereon at the rate of six (6) per cent per annum from the thirteenth (13th) day of July, A. D. 1907, and that the Complainants have execution therefor.

Done this, the fifteenth day of May, A. D. 1909, as of date December 13, A. D. 1907.

[Seal of Court.]

M. T. SIMONTON,

Clerk Circuit Court, First Circuit,

Territory of Hawaii.

Endorsed: No. —. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. George E. Smithies, Trustee, etc., Plaintiffs, vs. John F. Colburn, Executor, etc., Defendants. (Copy.) Complaint. Filed at 3 P. M. August 3, 1909. Henry Smith, Clerk. Atkinson & Quarles, 303 Judd Building, Honolulu, Hawaii, Attorneys for Plaintiffs.

39 In the Circuit Court of the First Circuit, Territory of Hawaii,
Holding Terms at Honolulu, City and County of Honolulu.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

v.

JOHN F. COLBURN, Executor under the Will of David Kawanānākoa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Term Summons.

(\$2.00 Stamps.)

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the
Sheriff of the City and County of Honolulu, or his Deputy:

You are commanded to summon John F. Colburn, Executor
under the will of David Kawanānākoa, deceased, and Jonah Kalaniana'ole, * * * Defendants, in case they shall file written
answer within twenty days after service thereof to be and appear before
the said Circuit Court at the term thereof pending immediately after
the expiration of twenty days after service hereof; provided, how-
ever, if no term be pending at such time, then to be and appear be-
fore the said Circuit Court at next succeeding term thereof, to-wit,
the Term thereof, to be holden at Honolulu, City and County
40 - of Honolulu on Monday the 10th day of January next, at
10 o'clock A. M. to show cause why the claim of George E.
Smithies, Trustee of Stella Keomailani Cockett, and Stella K.
Cockett, Beneficiary, Plaintiffs should not be awarded to them pur-
suant to the tenor of their annexed Complaint.

And you are commanded to * * *. And have you then there
this Writ with full return of your proceedings thereon.

Witness the Honorable John T. De Bolt, First Judge of the Cir-
cuit Court of the First Circuit, at Honolulu, Territory of Hawaii,
this third day of August, 1909.

[SEAL.]

HENRY SMITH, *Clerk.*

Endorsements: L. No. 7030 Reg. 2 Pg. 493. Circuit Court First
Circuit. George E. Smithies, Trustee, etc., Plaintiffs, v. John F.
Colburn, Executor, etc., Defendants. Term Summons. Issued at
3.5 o'clock P. M. Aug. 3, 1909. A. K. Aona, Ass't Clerk. Returned
at 11:30 o'clock A. M. Aug. 6, 1909. J. M. Ulunahale, Ass't Clerk.
Service at \$1.00 each ——. Cop. at \$1.50 each 17.50. Expense
——. Total ——. Honolulu Police Dept. Received Aug. 3, 1909,
at 3:40 o'clock P. M. Sol. Meheula, Clerk.

Served the within Summons as follows: On John F. Colburn, Ex-
ecutor under the Will of David Kawanānākoa, Deceased at Hono-
lulu, this 5th day of Aug., 1909.

On Jonah Kalaniana'ole, at Honolulu this 6th day of Aug., 1909, by delivering to them a certified copy hereof and of the complaint hereto annexed and at the same time showing them the original. Dated Honolulu, Aug. 6th, 1909.

CHARLES H. ROSE,
Deputy Sheriff.

Colburn, Aug. 5/09; Cupid 6/09.

Dem. of J. F. C. Ex. sustained; Dem. of J. Kalaniana'ole overruled. J. M. Clerk.

41 In the Circuit Court for the First Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Demurrer of Jonah Kalaniana'ole.

And now comes Jonah Kalaniana'ole, one of the Defendants in the above entitled action, by C. W. Ashford, his attorney, and separately demurs to the Declaration of said Plaintiffs herein, and for cause of demurrer he alleges and submits as follows:

1. That said Declaration doth not set forth facts sufficient to constitute a cause of action against this defendant, solus.

2. That said Declaration doth not set forth facts sufficient to constitute a cause of action, against this Defendant jointly with John F. Colburn, as Executor under the Will of David Kawanana'koa, Deceased.

Wherefore this Defendant prays judgment, whether any further or other answer shall be demanded of him in the premises, and further prays that he may be hence dismissed without day, and that his costs in this behalf may be awarded.

Dated this 24th day of August, 1909.

C. W. ASHFORD,
Attorney for Defendant Jonah Kalaniana'ole.

Endorsements: Service of the within Demurrer by copy is admitted this 25th day of August, 1909. Atkinson & Quarles, Attorneys for Plaintiff. L. No. 7030 Reg. 2 Pg. 493. In the Circuit Court for the First Circuit, Territory of Hawaii. George E. Smithies, Trustee of Stella Keomailani Cockett and Stella K. Cockett, Beneficiary, Plaintiffs, vs. John F. Colburn, Executor under the Will of David Kawanana'koa, Deceased, and Jonah Kalaniana'ole, Defendants. Demurrer of Jonah Kalaniana'ole. Filed Aug. 25, 1909, at 12:40 o'clock P. M. A. K. Aona, Ass't Clerk. C. W. Ashford, Attorney for Defendants.

42 In the Circuit Court for the First Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Crockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana-
koā, Deceased, and JONAH KAL-NIANA'OLE, Defendants.

Demurrer of Defendant John F. Colburn, Executor, etc.

And now comes John F. Colburn, Executor under the Will of David Kawanana-koā, Deceased; one of the Defendants in the above entitled Cause, by C. W. Ashford his Attorney, and separately demurs to the Declaration of the Plaintiffs, herein, and for cause of Demurrer he alleges and submits as follows:

1. That said Declaration doth not state facts sufficient to constitute a cause of action against this Defendant, nor against the Estate of said David Kawanana-koā.

2. That it affirmatively appears, upon the face of said Declaration that any right of action which Plaintiffs or either of them, may heretofore have had, in respect of anything alleged in said Declaration, against said David Kawanana-koā, during his life time, or against this Defendant, in his said capacity as Executor of the Will of David Kawanana-koā; or against the Estate of said David Kawanana-koā, has lapsed, and becomes barred by the Statutory Law of this Territory, especially by and under Section 1853 of the Revised Laws of Hawaii.

43 Wherefore this Defendant prays judgment, whether any further or other answer shall be demanded of him in the premises; and further prays that he may be hence dismissed without day, and that his costs in this behalf may be awarded.

Dated this 24th day of August, 1909.

C. W. ASHFORD,

*Attorney for Defendant John F. Colburn, Executor
under the Will of David Kawanana-koā, Deceased.*

Endorsements: Service of the within Demurrer by copy is admitted this 25th day of August, 1909. Atkinson & Quarles, Attorneys for Pl'ff. L. No. 7030 Reg. 2 Pg. 493. In the Circuit Court for the First Circuit, Territory of Hawaii. George E. Smithies, Trustee of Stella Keomailani Crockett, and Stella K. Crockett, Beneficiary, Plaintiffs, vs. John F. Colburn, Executor under the Will of David Kawanana-koā, Deceased and Jonah Kalaniana'ole, Defendants. Demurrer of Defendant John F. Colburn, Executor, etc. Filed Aug. 25, 1909 at 12:40 o'clock P. M. A. K. Aona, Ass't Clerk. C. W. Ashford, Attorney for Defendant.

44 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Joinder in Demurrer.

Now come the above entitled plaintiffs, by their attorneys, Messrs. Atkinson & Quarles, and joining in the demurrer of the defendant Jonah Kalaniana'ole to the complaint of the plaintiffs in the above entitled cause, say:

That the plaintiffs' complaint and the matters therein contained in manner and form as same are stated and set forth in said complaint, are sufficient in law for them, the said plaintiffs, to have and maintain as aforesaid their action against the said defendant Jonah Kalaniana'ole; and the said plaintiffs are ready to verify and prove same as the Court shall direct and award.

ATKINSON & QUARLES,

Attorneys for Plaintiffs.

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Notice.

To the Defendant Jonah Kalaniana'ole and C. W. Ashford, Esq.,
his attorney:

Take notice:

That on Tuesday, August 31, 1909, at the hour of Nine (9) o'clock A. M., or as soon thereafter as counsel can be heard, at the court room of the above entitled Court in the Judiciary Building in the city and county of Honolulu, Territory of Hawaii, the plaintiffs will move that the demurrer of the defendant Jonah Kalaniana'ole to the plaintiffs' complaint in the foregoing entitled cause be set down for hearing on a day certain, to be there and then fixed by the said Court.

Dated Honolulu August 28, 1909.

ATKINSON & QUARLES,

Attorneys for Plaintiffs.

Motion.

Come now the plaintiffs in the foregoing entitled cause and move the Court to set down for hearing on a day certain, to be fixed by the Court, the demurrer of the defendant Jonah Kalaniana'ole, to plaintiffs' complaint in the foregoing entitled cause.

ATKINSON & QUARLES,

Attorneys for Plaintiffs.

Service of the above and foregoing joinder in Demurrer, Notice and draft of Motion, is hereby admitted, by receipt of copies thereof, this August 28, 1909.

C. W. ASHFORD,

Attorney for Defendant Jonah Kalaniana'ole.

Endorsed: L. No. 7030. Reg. 2/493. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, Plaintiff, vs. John F. Colburn, etc., and Jonah Kalaniana'ole, Defendants. Joinder in Demurrer, Notice and Motion. Filed Aug. 28, 1909, at 11:50 o'clock A. M. J. A. Thompson, Clerk. Atkinson & Quarles, 303 Judd Building, Honolulu, Hawaii, Attorneys for Plaintiffs.

46 In the Circuit Court for the First Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanakoa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Order Sustaining Demurrer of John F. Colburn, Executor, etc.

The Demurrer of the above named Defendant John F. Colburn in his capacity as Executor of and under the Will of David Kawanakoa, Deceased, to the Declaration of the above named Plaintiffs in this Cause having been presented to the Court, and argued by Counsel for said Defendants and for said Plaintiffs respectively, and the Court being fully advised in the premises;

It is ordered, adjudged and decreed that said Demurrer is and the same is hereby sustained and that Plaintiffs take nothing against said last named Defendant, in his representative capacity as aforesaid, and that said last named Defendant, in his said representative capacity do go hence without day, and that he do recover his costs to be regularly taxed in this action, against said Defendant.

Dated this 3rd day of September, 1909.

WM. L. WHITNEY,

Second Judge of said Circuit Court.

O. K. as to form.

A. & Q.

By the Court:

JOHN MARCALLINO, Clerk.

Endorsed: L. No. 7030 Reg. 2 Pg. 493. In the Circuit Court for the First Circuit, Territory of Hawaii. George E. Smithies, Trustee, etc., etc., Plaintiffs, vs. John F. Colburn, Executor, etc., and Jonah Kalaniana'ole, Defendants. Order Sustaining Demurrer of John F. Colburn, Executor, etc. Filed at 9:55 A. M. Sept. 4th, '09. J. M. Ulunahale, Ass't Clerk. C. W. Ashford, Attorney for Defendants.

47 In the Circuit Court for the First Circuit, Territory of Hawaii,
January Term, 1909.

GEORGE E. SMITHIES, Trustee, et al., Plaintiffs,
vs.

JONAH KALANIANA'OLE et al., Defendants.

Bill of Costs of Defendant John F. Colburn, Executor, etc.

The said defendant, John F. Colburn, Executor of the Last Will and Testament of David Kawanamakoa, deceased, hereby claims of and from said Plaintiffs the following items of costs, that is to say:

Attorney's Fees.

Drawing demurrer, and serving copy	\$4.50
Appearance on argument of demurrer	3.00
Drawing this Bill of Costs, copy, and service	1.00
Drawing, copy and service of this Notice	1.00
Attendance for taxation of this Bill of Costs	1.00

Total..... \$10.50

Dated this 8th day of September, 1909.

C. W. ASHFORD,

*Attorney for John F. Colburn, Executor,
Est. of D. Kawanamakoa.*

48 To the above-named Plaintiffs, and to Messrs. Atkinson & Quarles, their Attorneys:

You will please take notice that the foregoing Bill of Costs will be presented for taxation, (unless the same be approved by you,) before the Honorable, the Second Judge of said Circuit Court, at 9:00 o'clock in the forenoon of Saturday, the 11th day of September, 1909, or as soon thereafter as counsel may be heard.

Dated this 8th day of September, 1909.

Yours, &c.,

C. W. ASHFORD,

Attorney for Dft John F. Colburn, Executor, etc.

O. K. for \$9.50.

ATKINSON & QUARLES,

Att'ys for Plffs.

O. K.

C. W. A.

Endorsed: L. No. 7030 Reg. 2 Pg. 493. Circuit Court, First Circuit, Territory of Hawaii. George E. Smithies, Trustee, et al., Plaintiffs, vs. Jonah Kalaniana'ole, et al., Defendants. Bill of Costs of Defendant John F. Colburn, Executor, etc. Filed September 8,

1909, at 10:55 o'clock A. M. J. A. Thompson, Clerk. Clarence W. Ashford for said Defendant.

49 In the Circuit Court for the First Circuit, Territory of Hawaii,
January Term, 1909.

GEORGE E. SMITHIES, Trustee, et al., Plaintiffs,

vs.

JONAH KALANIANA'OLE et al., Defendants.

Judgment for John F. Colburn, Executor, etc.

In the above entitled cause, the Demurrer of Defendant John Colburn, as Executor of and under the Last Will and Testament of David Kawanānākoa, deceased, to Plaintiffs' declaration herein having been submitted to the Court; and the Court having filed its written Order sustaining the same, and ordering that said last named Defendant be hence dismissed without day, and that he have and recover from Plaintiffs, his costs, in this behalf sustained;

Now therefore, it is adjudged and considered that said Plaintiffs take nothing by their said action, as against said Defendant John F. Colburn, as Executor of and under the Last Will and Testament of David Kawanānākoa, Deceased; but that said last named Defendant do go hence without day; and that he do have and recover of and from said Plaintiffs his costs, by him sustained in this action, which said costs are hereby taxed at the sum of Nine 50/100 Dollars (\$9.50).

Done and entered this 8th day of September, 1909.

By the Court:

[SEAL.]

JOHN MARCALLINO, *Clerk.*

Received copy of above this Sept. 8, 1909.

ATKINSON & QUARLES.

Endorsed: L. No. 7030 Reg. 2 Pg. 493. Circuit Court, First Circuit, Territory of Hawaii. George E. Smithies, Trustee, et al., Plaintiffs, vs. Jonah Kalaniana'ole, et al., Defendants. Judgment on Demurrer, for Defendant John F. Colburn, as Executor, etc., Filed September 8, 1909, at 10:55 o'clock A. M. J. A. Thompson, Clerk. Clarence W. Ashford, Attorney for said Defendant.

50 In the Circuit Court for the First Circuit, Territory of Hawaii,
January Term, 1909.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanānākoa,
Deceased, and JONAH KALANIANA'OLE, Defendants.

Answer of Defendant Jonah Kalaniana'ole.

And now comes Jonah Kalaniana'ole one of the defendants herein, by C. W. Ashford his Attorney, and not hereby waiving any of the

matters of defense raised by his Demurrer to the Plaintiffs' Declaration herein, but insisting thereon, for answer to said Declaration he alleges and submits.

1. That this is a joint action against this defendant and John F. Colburn, as Executor of and under the Last Will and Testament of David Kawanakoa deceased, as co-defendant with this Defendant herein, and that, inasmuch as it appears by the records and files herein that judgment has heretofore, to wit, on the 8th day of Sept. 1909, been entered in this action in favor of said John F. Colburn as such Executor as aforesaid, and against said Plaintiffs, to the effect that said Plaintiffs in this, their action, take nothing as against said John F. Colburn as such Executor, and the said John
51 F. Colburn as such Executor as aforesaid do go hence without day, and do recover his costs incurred in this action. Therefore, the said Plaintiffs ought not to further have or maintain this, their said joint action as against this Defendant.

2. That the cause of action, if any, set forth by the said Declaration, was, prior to the release hereinafter set forth, as appears by said Declaration, a joint cause of action against this defendant, jointly with David Kawanakoa, during the life time of said David Kawanakoa, and since the death of said David Kawanakoa the same was a joint cause of action against this Defendant, jointly with John F. Colburn as the Executor of and under the Last Will and Testament of said David Kawanakoa. That said John F. Colburn as such Executor, in due time after his appointment and qualifying as such Executor, caused due notice to be given to creditors of the Estate of said David Kawanakoa to present to him, said John F. Colburn, as such executor, their several claims against the Estate of said David Kawanakoa. That thereafter, and within six months from and after the first publication of said Notice, the said Plaintiffs duly and regularly presented to said Executor their claim against said Estate, and that the claim so presented by said Plaintiffs was the identical claim now stated as a cause of action herein. That thereafter, in time and manner prescribed by statute, said Executor in writing, rejected the said claim of said Plaintiffs, and immediately thereafter served said Plaintiffs a written notice of his, said Executor's, said rejection of said claim. That thereafter, more than two months were by said Plaintiffs permitted to elapse, next following the receipt by them, said Plaintiffs, of said written notice of the rejection by said Executor of said claim, during which said period of more than two months, no suit or action was brought by said Plaintiffs or either of them, to recover upon, or to compel the recognition of said claim, or the payment thereof or of any part
52 thereof, of, from, or by said Executor or of, from or by the Estate of said David Kawanakoa. Wherefore this Defendant submits that said Plaintiffs ought not further to have or maintain this action against this Defendant, because

(a) The failure and neglect of said Plaintiffs within two months from and after the said rejection of their said claim to bring action upon and to recover, and to compel the recognition and (or) the payment of their said claim, by said Executor, operated as a release by

said Plaintiffs of their said claim, as against said Executor, and as against the Estate of said David Kawanakoa.

(b) That such release as aforesaid, being the release of one of several joint debtors further operated as a release of said claim by said Plaintiffs, as against this Defendant.

3. That whereas one final judgment hath heretofore, to wit, on the 8th day of September, 1909, been rendered and entered in this action, to wit the judgment against said Plaintiffs, and in favor of said Defendant John F. Colburn as such Executor, as aforesaid, it is not now competent for this Honorable Court to pronounce or to render any other or further judgment against this Defendant herein.

4. And for another and further defense, this Defendant not hereby waiving or intending to waive any of the causes of defense herein before set forth, hereby denies each and every, all and singular, the matters and things in said Declaration set forth.

And said Defendant hereby gives notice that, upon the trial of this cause, he will rely, among other defenses, upon the defenses of Release Payment, and the Statute of Limitations.

Dated this 8th day of September, 1909.

JONAH KALANIANAOLE,

By C. W. ASHFORD,

His Attorney.

53 Endorsements: Service of the within Answer by copy is hereby acknowledged, this 9th day of September, 1909. Atkinson & Quarles, Attorneys for Plaintiffs. L. No. 7030 Reg. II Pg. 493. Circuit Court, First Circuit. George E. Smithies, Trustee, et al., Plaintiffs, vs. Jonah Kalanianaole, et al., Defendants. Answer of Defendant Jonah Kalanianaole. Filed 10:25 o'clock A. M. Sept. 9th, 1909. J. M. Ulunahale, Ass't Clerk. Clarence W. Ashford, Attorney for said Defendant.

54 In the Circuit Court of the First Circuit, Territory of Hawaii,
January Term, 1910.

GEORGE E. SMITHIES, Trustee, etc., Plaintiff,

v.

JONAH KALANIANAOLE, Defendant.

Decision.

This cause came on for trial and the parties were at issue on the 13th day of December, 1909, jury being waived; and from the evidence introduced on behalf of the parties the Court finds for plaintiff to recover of defendant the sum of five thousand two hundred eighty and 75/100 dollars, with interest from the 13th day of July, 1907.

It is therefore ordered that judgment be entered accordingly.
January 27th, 1909.

WM. L. WHITNEY,
2nd Judge, Circuit Court of the First Circuit.

(Judgment for Plaintiff.)

Endorsed: Law No. 7030. Reg. 2/493. Circuit Court, First Circuit. George E. Smithies, Tr., etc., vs. J. K. Kalaniana'ole. Decision. Filed Jan. 27, 1910, at 2:40 P. M. J. Marcallino, Clerk.

55 In the Circuit Court of the First Judicial Circuit of the
Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JONAH KALANIANA'OLE, Defendant.

Plaintiffs' Bill of Costs.

Court costs as per taxation of Clerk.....	\$17.50
Attorneys'	
Drawing complaint and one copy.....	4.50
Attending trial of cause.....	3.00
Drawing, serving, and copy bill of costs.....	1.00
Total.....	\$26.00

ATKINSON & QUARLES,
Attorneys for Plaintiff.

Costs taxed in sum of \$26.00 this 28th day of Jan., 1910.
J. MARCALLINO, Clerk.

The foregoing bill of costs is correct, and no objections to same
or any item thereof, subject to exception, &c., to the judgment.

C. W. ASHFORD,
Attorney for Defendant.

Endorsed: L. No. 7030 Reg. 2 Pg. 493. In the Circuit Court of
the First Judicial Circuit Territory of Hawaii. George E. Smithies,
Trustee, etc., Plaintiffs, vs. Jonah Kalaniana'ole, Defendant. Plain-
tiffs' Bill of Costs. Filed January 28, 1910, at 3:47 o'clock P. M.
J. A. Thompson, Clerk.

56 In the Circuit Court of the First Judicial Circuit, Territory
of Hawaii.

GEO. E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JONAH KALANIANA'OLE, Defendant.

Judgment.

The above entitled cause having heretofore come on regularly for trial before the Court, a jury having been waived by both parties Messrs. Atkinson & Quarles, appearing as counsel for plaintiffs, and C. W. Ashford, Esq., appearing as counsel for the defendant, the cause was submitted upon stipulation of fact and by the Court taken under advisement; and the Court having sufficiently considered the case and being sufficiently advised in the premises, did on the 27th day of January, 1910, render in writing its Decision, in favor of the plaintiffs and ordering Judgment in favor of the plaintiffs and against the defendant Jonah Kalaniana'ole.

It is therefore ordered and adjudged that the plaintiffs, Geo. E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, beneficiary, do have and recover of and from the defendant, Jonah Kalaniana'ole the sum of Five Thousand Two Hundred Eighty and seventy-five hundredths Dollars, with interest thereon from the 13th day of July, 1907, at the rate of six (6%) per cent. per annum, which interest now amounts to the sum of Eight Hundred and Five Dollars and forty cents, making a total of principal and interest of the sum of Six Thousand and Eighty-six Dollars and Fifteen Cents, (\$6086.15), together with costs taxed at \$26.00 for which execution may issue.

By order of the Court:

[SEAL.]

JOHN MARCALLINO,

Clerk First Circuit Court.

Done in open Court this 28th day of January, 1910.

O. K. as to form.

C. W. ASHFORD,

Attorney for Defendant.

Endorsed: L. No. 7030 Reg. 2 Pg. 493. In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii. George E. Smithies, Trustee, etc., Plaintiffs, vs. Jonah Kalaniana'ole, Defendant. Judgment. Filed January 28, 1910, at 3:47 o'clock P. M. J. A. Thompson, Clerk.

57 In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, 1909 Term.

Clerk's Minutes.

FRIDAY, September 3rd, A. D. 1909.

At 2 o'clock p. m. the Court convenes.

Present:

Honorable William L. Whitney, Second Judge, presiding.
John Marcallino, Clerk.
G. D. Bell, Stenographer.

L. 7030.

GEORGE E. SMITHIES, TE.,

v.

JOHN F. COLBURN, Executor, and J. KALANIANA'OLE.

Assumpsit.

Demurrers.

R. P. Quarles, Esq., appearing for Plaintiff.
C. W. Ashford, Esq., appearing for Defendants.

Counsel agree that the Joinder to the Kalaniana'ole demurrer be considered the Joinder to the Demurrer of J. F. Colburn, Executor.

Mr. Ashford presents demurrers and argues concluding at 2:45 P. M.

Mr. Quarles argues concluding at 2:47 p. m.

Mr. Ashford replies concluding at 2:48 p. m.

The Court orders the demurrer of J. Kalaniana'ole overruled, and the demurrer of J. F. Colburn, Executor, sustained. Defendant J. Kalaniana'ole given ten days within which to answer.

Exception noted by Mr. Ashford and allowed by the Court.

Exception noted by Mr. Quarles and allowed by the Court.

58 MONDAY, Dec. 13th, 1909.

At 10:15 a. m. the Court convenes.

Present:

Honorable William L. Whitney, Second Judge, presiding.
John Marcallino, Clerk.
G. D. Bell, stenographer.

Trial.

R. P. Quarles, Esq., appearing for Plaintiff.
C. W. Ashford, Esq., appearing for defendant, J. K. Kalaniana'ole.

Mr. Ashford objects to the introduction of any evidence under the complaint in this case.

Mr. Ashford argues concluding at 10:25 a. m.

Mr. Quarles argues concluding at 10:27 a. m.

The Court orders objection overruled.

Exception noted by Mr. Ashford.

Mr. Ashford states that he admits facts stated in the complaint, except facts in paragraph 10 referring to the rejection of Plaintiff's claim in the Estate of D. Kawanānakoā, but as to that the defendant is willing to admit that the claim was rejected on May 29, 1909.

Mr. Quarles admits facts as shown by the Bill of Complaint.

Mr. Ashford further admits that the claim has not been paid.

Counsel submit the case to the Court. Brief to be filed by Mr. Ashford by Monday, Dec. 20, 1909, and Mr. Quarles is given till Monday, Dec. 27, 1909, to file reply authorities.

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EXHIBIT "II" OF RECORD.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

MONDAY, *December* 14, 1909.

SMITHIES

vs.

COLBURN.

MR. ASHFORD: I shall at the outset object to the introduction of any testimony whatsoever under the complaint and declaration herein, upon the grounds that this is a joint action,—a joint and several action against the defendant Jonah Kalaniana'ole on the one hand, and David Kawanānakoā and the executor of his last will and testament on the other hand.

To put it a little more definitely, that it was during the—that the cause of action stated in the declaration, if any, was during the life of David Kawanānakoā, a joint cause of action against David Kawanānakoā and Jonah Kalaniana'ole, tht fter the death of David Kawanānakoā, and his will probated, and ever since, and it is now, a joint cause of action against Jonah on the one hand and John F. Colburn in his representative capacity as executor of the last will and testament of David Kawanānakoā on the other hand, and that this action should not be further maintained in the name of the present plaintiffs as against Jonah only.

Second, that by a judgment duly and regularly rendered in this court and cause on or about the 8th day of September, 1909, it was adjudged that the plaintiffs take nothing as against the Estate of David Kawanānakoā, or as against John F. Colburn, in his said representative capacity, and that there having been one regular and formal judgment entered in the matter, it is not competent for the court to enter another and further judgment, and in particular, that it is not competent to render a judgment now

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in favor of the plaintiffs and against Jonah Kalaniana'ole upon the pleadings.

Third, that inasmuch as the pleadings set forth a joint cause of action, if any cause of action be set forth, against Jonah Kalaniana'ole and another, it is not competent for the court to render judgment over the objection of Jonah Kalaniana'ole against him solus, and neither is it competent for the court since the rendition of the judgment of September 8th, 1909, in favor of Colburn, Executor, in this case, to render a judgment in favor of the plaintiffs as against Jonah Kalaniana'ole and the representative of David Kawanana'koa's estate.

And upon the further ground that the declaration does not set forth facts sufficient to constitute a cause of action against Jonah Kalaniana'ole solus.

The COURT: Objection overruled.

Exception allowed.

Mr. ASHFORD: For the purpose of facilitating the case, and without prejudice to the rights of the defendants under his demurrer herein, under his answer and under the objections this day made to the introduction of testimony and overruled by the court, and also, if the plaintiff is willing to admit the matters of fact, excluding conclusions of law, set forth in the defendant's answer filed in this case on September 9th, 1909, I am willing for the—if the defendant will admit all the allegations of fact contained in the plaintiff's declaration, except the allegation in paragraph 10 referring to the rejection of plaintiff's claim by the executor of the will of David

Kawanana'koa, wherein it is stated that the rejection was made "without any reason or excuse, and arbitrarily," but with respect to that feature, the defendant is willing to admit that the claim was rejected by the executor, of the estate of David Kawanana'koa, on the 29th day of May, 1909.

Mr. QUARLES: We admit what the bill of complaint shows, the claim was presented.

Mr. ASHFORD: I therefore admit all the allegations of the declarations except the allegation that the rejection of the claim was made "arbitrarily and without any reason or excuse therefor" but do admit that it was rejected, and that it has not been paid.

Mr. QUARLES: We submit the case.

Mr. ASHFORD: I would like an opportunity if the court please to file some authorities.

I hereby certify that the foregoing is a true and accurate transcript of the matters above contained taken down by me in shorthand and by me herewith transcribed.

GILLSON D. BELL,

Official Reporter.

Honolulu, Feb. 3, 1910.

62 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Plaintiffs,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa,
Deceased, and JONAH KALANIANA'OLE, Defendants,

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII.

City and County of Honolulu, ss:

I, John Marcallino, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, do hereby certify that the foregoing documents and attached hereto together with the indorsements thereon and enumerated hereunder, being pages numbered from (1 to 41 both inclusive,) to wit:

1. Bill of complaint, and attached thereto as Exhibit "A" thereof, are the following: (*a*) creditor's claim for \$5280.75 and interest against the Estate of David Kawanana'koa, Deceased annexed thereto is the oath of George E. Smithies; (*b*) assignment by Ellen Albertina Polyblank to George E. Smithies of deficiency judgment against David Kawanana'koa and Jonah Kalaniana'ole and dated May 5, 1909, (*c*) final decree in a suit entitled Ellen Albertina Polyblank, et al., Plaintiffs, vs. David Kawanana'koa, et al. (Equity Number 1431) and (*d*) deficiency judgment in said suit of Ellen Albertina Polyblank, et al. v. David Kawanana'koa, et al. 1-23
2. Term summons and return of service thereof and of the bill of complaint by Charles H. Rose, Deputy Sheriff. . . 24-25
3. Demurrer of Jonah Kalaniana'ole and admission of receipt of copy thereof. 26
4. Demurrer of John F. Colburn, Executor under the Will of David Kawanana'koa, Deceased, and admission of receipt of copy thereof. 27-28
5. Joinder in the demurrer of Jonah Kalaniana'ole, notice and motion to set demurrer of Jonah Kalaniana'ole for hearing and admission of receipt of copy thereof. . . 29-30
- 63
6. Order sustaining demurrer of John F. Colburn, Executor. . . 31
7. Bill of costs of John F. Colburn, Executor and notice of time for taxing same. 32-33
8. Judgment for John F. Colburn, Executor, dated September 8, 1909 34
9. Answer of Jonah Kalaniana'ole and admission of receipt of copy thereof. 35-38
10. Decision of Judge William L. Whitney. 39

11. Bill of costs of plaintiffs.	40
and 12. Judgment for plaintiffs dated January 28, 1910. . . .	41

are full, true and correct copies of each of the originals thereof which are now on file in the Clerk's Office of said Circuit Court in the above entitled cause, (Law Division Number 7030).

I further certify that the foregoing document and attached hereto being pages numbered from (42 to 43) both inclusive is a full true and correct transcript of the clerk's minutes of the proceedings had before the Hon. W. L. Whitney, Second Judge of the said Circuit Court in the above entitled cause on Sept. 3 and December 13, 1909, said minutes being entered and recorded in Volume 2 Term Minutes on pages 362 and 466 thereof:

And I lastly certify that the foregoing document and attached hereto being pages numbered from (44 to 46 both inclusive) is a full true and correct copy of the stenographer's transcript of the proceedings had December 14, 1909, in the above entitled cause, the original of which was heretofore transmitted to the Supreme Court of the Territory of Hawaii on bill of exceptions.

Witness my hand and the Seal of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Honolulu, City and County of Honolulu, this 29th day of March, A. D. 1910.

[SEAL.]

JOHN MARCALLINO,

Clerk Circuit Court of the First Judicial

Circuit, Territory of Hawaii.

Endorsed: No. 490. Reg. 1 434. Supreme Court, Territory of Hawaii. October Term, 1909. George E. Smithies, Trustee of Stella Keomailani Cockett and Stella K. Cockett, Beneficiary, Plaintiffs, vs. John F. Colburn, Executor under the Will of David Kawanamaka, Deceased and Jonah Kalaniana'ole, Defendants. Return of John Marcallino to Writ of Error accompanied by Transcript of Record on Writ of Error. Filed March 29, 1910, at 2:35 o'clock P. M. J. A. Thompson, Clerk.

64 In the Supreme Court of the Territory of Hawaii, October Term, 1909,

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary,

v.

JOHN F. COLBURN, Executor under the Will of David Kawanamaka,
Deceased, and JONAH KALANIANA'OLE.

Error to Circuit Court, First Circuit.

Argued April 15, 1910; Decided April 21, 1910.

Hartwell, C. J., Perry and De Bolt, JJ.

Parties—capacity to sue.

A new trustee can join with the beneficiary in bringing an action on a judgment in favor of the beneficiary and the former trustee

who had assigned the judgment to him "as far as I am authorized so to do."

Judgment—effect upon one judgment debtor of release of another.

A release by operation of law of one judgment debtor upon a ground not applicable to the other does not operate to release the other.

Judgment—executors and administrators.

Upon the death of one judgment debtor the other succeeds to the joint obligation of the judgment, and he is liable alone and not jointly with the executors or administrators of the deceased judgment debtor. The executors and administrators are not liable at law in such case.

The plaintiff in error, referred to in this opinion as the defendant, was a codefendant in the court below. The other defendant did not join in the petition for the writ and did not join issue having obtained a separate judgment in the court below and not being further concerned in the case.

This was an action on a judgment recovered in the circuit court by Albertina Pollyblank, trustee for Stella Cockett, and Stella Cockett against David Kawanana'ole and Jonah Kalaniana'ole for the sum of \$5,280.75, besides interest and costs, being the amount of the deficiency found to be owing upon the foreclosure of their mortgage to the trustee. The judgment was affirmed on successive appeals (17 Haw. 82; 205 U. S. 349), and the trustee resigning the plaintiff George Smithies was appointed by the court as trustee in her place. David Kawanana'ole having died and John F. Colburn being executor of his will, the judgment claim was presented to him and rejected. Thereupon the new trustee and the beneficiary brought this action. The executor demurred to the declaration on the ground that it did not state facts sufficient to constitute a cause of action against him or the estate of the decedent and that the action was not brought within two months after the claim was rejected, being the time limited by statute for actions against executors on claims rejected by them. The defendant Jonah Kalaniana'ole demurred on the grounds that the declaration did not state facts sufficient to constitute a cause of action against him solus or conjointly with the executor. The executor's demurrer was sustained and he took judgment on the order sustaining the demurrer. The demurrer of the defendant Jonah Kalaniana'ole was overruled and after excepting to the order overruling it he answered. At the hearing, to which he excepted, relying on his demurrer, jury being waived, he admitted the averments in the declaration except
 66 the averment that the executor arbitrarily rejected the claim and judgment against him was entered for the plaintiffs in the sum of \$6,086.15 and \$26 costs.

The defendant's claim, presented in various forms in his assignment of errors, is that his demurrer ought to have been sustained on the ground that a release of one judgment debtor releases the other. In his reply brief he claims that the demurrer ought to have been sustained on the ground that a judgment is not assignable at law and that if it is assignable under the statute the beneficiary should have joined in the assignment. The declaration avers the resignation of the former trustee, the appointment of the new trustee by the court and that the judgment was duly assigned by her to the plaintiff Smithies.

A demurrer on the ground that the plaintiff has no legal capacity to sue cannot be sustained unless it appears on the face of the complaint that he has not such capacity. *Barkley v. Quicksilver*, 6 Lans. 25. A plea in abatement "is the proper mode of taking advantage of the objection." 1 Chit. Pl. 16 Am. Ed. 464; 31 Cyc. 324. There is the further difficulty in considering this objection that it is not specified in the demurrer. At common law, after the statute of the 27 Eliz. c. 5, defects in form must be pointed out specially and judgment could not be reversed on error for any "imperfection, defect or want of form" unless "specially and particularly set down and expressed" in the demurrer. 1 Chit. Pl. 695. If the objection is properly before us, its force is not apparent since the beneficiary retains her interest in the judgment and the trustee assigned, as expressed in Exhibit A in the record, "so far as I am authorized so to do." A judgment is assignable as a non-negotiable chose in action. See, 1739 R. L.

This is, as treated by each of the parties, a joint judgment. The dictum in *Bowler v. McIntyre*, 9 Haw. 306, that a judgment is joint and several is made upon the authority of Black on
67 Judgments, Sec. 210, which is supported by decisions based on statute.

If one of two or more persons bound by their joint obligation is released from it by the obligee the obligation is not enforceable against either of the others for the simple reason that it was not a several obligation. And so the obligation of a judgment imposed by law upon two joint judgment debtors is discharged by release of one of them by the judgment creditor or by his release by operation of law on grounds applicable alike to the other judgment debtor. If, however, one judgment debtor avoids the effect of the judgment not by a release by the judgment creditor nor upon a ground equally applicable to the other the latter is still bound. "But judgment recovered by one of several joint debtors, is not a defence to a subsequent action against the others, unless it be shown that the judgment was recovered on a ground which operated as a discharge of all." 2 Chit. Contr. 1176. "Judgment in favor of one co-obligor would extinguish the obligation against the others unless obtained in consequence of a defence applying peculiarly and alone to a party in whose favor it had been obtained." *Hunt v. Terrill's Heirs*, 30 Ky. 68.

It was held in *Phillips v. Ward*, 2 H. & C. 716, that "A judgment recovered by one of several joint debtors cannot be pleaded as a de-

fence to a subsequent action against the other joint debtors in respect of the same cause, unless a plea shows that the judgment was recovered on a ground which operated as a discharge of all," Bramwell, B., saying: "No doubt if a person jointly liable with others succeeds in an action against him alone by pleading a release or payment, that would afford a good defence to an action against the other joint debtors—whether pleaded in bar or by way of estoppel seems unimportant—for a release to one is a release to all, and payment by one is a discharge of all. Therefore, in some cases, a judgment

recovered by one of several joint debtors may be pleaded in
68 an action against the others. But this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors; but only that the Court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency;" Channell, B.: "The defendants plead a judgment recovered by a joint debtor in a former action for the same cause; and I think it incumbent on the defendants to show by their plea that the judgment in that action is inconsistent with their liability in this action. But, so far as this plea states, the judgment for the defendant in the former action may have proceeded on a ground which, though affording a perfect defence as regards him, does not affect the liability of the present defendants." (P. 719.) "When a suit is commenced against several joint debtors, upon a joint contract, and one of them pleads or gives in evidence matter which is a bar to the action, as against him only, and of which the others cannot take advantage, as it respects them, there can be no good reason why the plaintiff should not be at liberty to proceed to take judgment against them." *Hartness v. Thompson*, 5 Johns. 160, 161. And see *Hill v. Morse*, 61 Me. 541, 543. "A mere discharge by operation of law of one of several debtors without the consent of the creditor will not take away his remedy against the others." 2 Chit. Pl. 455. "The common rule is that on the death of one joint promisor the surviving promisors alone remain liable" and that "any cause operating to discharge the right of action against one of several joint promisors will discharge all of them except where one receives a purely personal discharge as in bankruptcy or by a covenant not to sue." *Harriman, Contr. Secs.* 353, 354.

In *Conn. Fire Ins. Co. v. Aldendorf*, 73 Fed. 88, cited by the defendant, separate judgments on a joint contract had been entered on different days in favor of the defendants. The court dismissed the plaintiff's writ of error to review the judgment last entered
69 tered because the six months allowed to bring the writ had elapsed in respect of the earlier judgment, holding that the failure to bring the writ seasonably required its dismissal in respect of one judgment as well as the other as equivalent to a release "by operation of law and at the instance and by the act of the creditor." If the decision is inconsistent with the authorities above cited we decline to accept its authority.

The defendant Jonah Kalaniana'ole was not released from the joint obligation of the judgment against himself and David Kawanana'koa

by reason of the release of the executor of the will of David by operation of law although the release was based on the plaintiff's delay to bring the action in two months after the claim against the executor was rejected. The release in no way affected the sole obligation, which rested upon Kalaniana'ole upon the death of the other obligor. From the nature of a joint obligation personal representatives of obligors are not liable severally as long as there is a surviving obligor. The death of a joint obligor does not extinguish the obligation of the surviving obligor. As joint property goes to the surviving owner and not to the heirs or representatives of the deceased, so a joint obligation becomes that of the survivor. Joint liability is an entirety and a cause of action for breach of a joint contract does not survive against the representatives of a deceased joint contractor because of the nature of such contracts and of the mutual rights of joint contractors.

"In case of a joint contract, if one of the parties die, his executor or administrator is at law discharged from liability, and the survivor alone can be sued." 1 Chit. Pl. 58. "In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued." 3 Williams on Executors, 1842. "If one of several joint contractors dies, the survivors must be sued to the exclusion of the personal representatives of the deceased." 2 Chit. Contr. 1356. See also

70 Harrison v. Magoon, 13 Haw. 339, 353. "The consequence of which" (survivorship of joint ownership) "is, that, where two or more persons are parties on the same side, and the promise by or to them is joint,—the ordinary case of a joint contract,—the death of one joint party transmits both his interest and his burdens, not to his administrator, but to his living fellow parties on the same side with himself. They may sue or be sued on it; but the administrator can neither be joined as a party with them, nor sue or be sued alone." Bish. Contr., Sec. 683.

Ashbee v. Pidduck, 1 M. & W. 564, was an action on a joint bond in which it was held that a release given by the obligee to the representative of one of the deceased obligors was not "a release to the surviving obligor, as on the death of one it survived to the others," and "no action could be maintained" against the executor.

The plaintiffs' claim, therefore, that even if their action had been brought within the two months required for actions against executors and administrators the executor could not have been held, must be sustained.

We see no merit in the defense that the plaintiffs by bringing the action against the executor and himself jointly are thereby precluded from taking judgment against himself as sole defendant on the theory that having made their election they must stand or fall upon it, or that there can be but one judgment on the pleadings for or against both defendants. "To seek a remedy against a wrong person does not deprive a plaintiff of his remedy against the right party." *Dumoïs v. New York*, 76 N. Y. Suppl. 161, 164. "If the suitor has in his first action mistaken his remedy and adopted a

mode of redress incompatible with the facts of his case and is defeated on that ground he is still free to elect to proceed anew." 7 Enc. Pl. & Pr. 367, and see 15 Cyc. 262. "Whenever a defendant

71 pleads matter which goes to his personal discharge, or any matter that does not go to the nature of the writ, or pleads or gives in evidence a matter which is a bar to the action against himself only, and of which the others could not take advantage, judgment must be for such defendant and against the rest." 11 Enc. Pl. & Pr. 850.

The plaintiffs' declaration upon a joint liability did not preclude them from recovering or upon a several liability. It was not requisite to amend the pleadings or to discontinue and bring another action.

Judgment affirmed.

ALFRED S. HARTWELL,
ANTONIO PERRY,
JOHN T. DE BOLT.

R. P. QUARLES,

(*Atkinson & Quarles on the Brief*) for Plaintiffs.

C. W. ASHFORD,

For Defendant.

Endorsed: No. 490. Supreme Court, Territory of Hawaii, October Term, 1909. George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, v. John F. Colburn, Executor under the Will of David Kawanāna'ōle, Deceased and Jonah Kalaniana'ole. Opinion. Filed April 21, 1910, at 2:15 P. M. J. A. Thompson, Clerk.

72 In the Supreme Court of the Territory of Hawaii, October, A. D. 1909, Term, April, A. D. 1910, Session.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Defendants in Error,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanāna'ōle,
Deceased, and JONAH KALANIANA'OLE, Plaintiffs in Error.

Error to First Circuit Court.

Judgment.

In the above entitled cause it is adjudged that the judgment of the Circuit Court of the First Judicial Circuit of date January 28th, A. D. 1910, be, and the same hereby is, in all things, affirmed.

It is further adjudged that the defendants in error have and recover from the plaintiff- in error their costs in this Court incurred taxed at the sum of \$41.25.

Dated this the 30th of April, 1910.

H.

By the Court:

[SEAL.]

J. A. THOMPSON,
Clerk of the Supreme Court of the
Territory of Hawaii.

Endorsed: No. 490. In the Supreme Court of the Territory of Hawaii. George E. Smithies, Trustee, etc., Defendants in Error, vs. John F. Colburn, Executor, etc., Plaintiffs in Error. Judgment. Filed April 30, 1910, at 11 o'clock A. M. J. A. Thompson, Clerk.

73 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and STELLA K. COCKETT, Beneficiary, Defendants in Error,

vs.

JOHN F. COLBURN, Executor under the Will of David Kawanana'koa, Deceased, and JONAH KALANIANA'OLE, Plaintiff in Error.

Petition for Writ of Error and Supersedeas.

To the Honorable the Justice of the Supreme Court of the Territory of Hawaii:

Your petitioner, Jonah Kalaniana'ole, the Plaintiff in Error above named, respectfully shows that the above entitled cause is now pending in said Supreme Court of the Territory of Hawaii, and that a judgment was rendered in said cause, in and by said Supreme Court, on the 30th day of April, 1910, affirming a judgment of the Circuit Court for the First Circuit of said Territory, which last named judgment was rendered by said Circuit Court on, to wit, the 28th day of January, 1910, and, in and by which said last named judgment, said Circuit Court did adjudge and award to the Defendants in Error above named,—(who were the Plaintiffs in said Circuit Court) the sum of, to wit, six thousand eighty-six and 15/100 dollars, (\$6086.15) besides costs, to be paid to said Defendants in Error by said Plaintiff in Error, to wit this petitioner. That the matter in controversy in said cause exceeds the sum of \$5,000.00, besides

74 costs,—and that the same is a proper case to be reviewed by the Supreme Court of the United States upon Writ of Error.

Wherefore your petitioner respectfully prays that a Writ of Error may be allowed him in the above entitled cause, directing the clerk of the said Supreme Court of the Territory of Hawaii, to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the Errors complained of in the Assignment of Errors herewith filed by said Plaintiff in Error may be reviewed, and, *and* if any be found, corrected according to the laws and customs of the United States.

And your petitioner further prays for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may be appropriate in the premises, and as may cause and procure the issuance of a supersedeas herein, to the end that all further proceedings in this Honorable Court may be suspended and stayed until the determination of such Writ of Error by said Supreme Court of the United States.

78 TERRITORY OF HAWAII,
City and County of Honolulu, ss:

W. A. Kinney and John F. Colburn having been duly sworn, do hereby each for himself, and not for each other, depose and say:

That he signed the foregoing bond as and for his free act and deed; and that he is worth the amount of the penalty of said bond, in his own right, in property located in said Territory of Hawaii, not exempt from execution, and over and above all debts owing by him; and that he is a householder, and a freeholder, within said City and County.

W. A. KINNEY.
 JOHN F. COLBURN.

Sworn to before me this — day of June, 1910.

[SEAL.]

ARTHUR G. SMITH,
*Notary Public, First Judicial
 Circuit, Territory of Hawaii.*

Endorsed: No. 490. In the Supreme Court of the United States, Jonah Kalaniana'ole, Plaintiff in Error, vs. George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Defendants in Error. Bond on Writ of Error. Filed June 10, 1910, at 9:25 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Clarence W. Ashford, Attorney for Defendant in Error.

79 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
 STELLA K. COCKETT, Beneficiary, Defendants in Error,
 vs.

JOHN F. COLBURN, Executor under the Will of David Kawamauakoa, Deceased, and JONAH KALANIANA'OLE, Plaintiff in Error.

Assignment of Errors.

To the Honorable the Justice of the Supreme Court of the Territory of Hawaii:

The said Plaintiff in Error in this action, in connection with his petition for a Writ of Error, makes the following assignment of Errors, which he avers and submits were committed by said Supreme Court of the Territory of Hawaii in and by its opinion, decision and judgment in this cause, that is to say:

1. The Court erred in deciding that George E. Smithies, one of the Plaintiffs in the Circuit Court, and one of the Defendants in Error herein, as trustee of Stella Keomailani Cockett, could properly join, and was properly joined, as a party Plaintiff in this cause,

and could maintain, jointly with said Stella K. Cockett, his co-Plaintiff herein, this action against this Plaintiff in Error.

80 2. The Court erred in deciding and holding that the Defendants in Error herein, (Plaintiffs in said Circuit Court,) could maintain this action, under the pleadings herein, against this Plaintiff in Error.

3. The Court erred in deciding and holding that said Defendants in Error (Plaintiffs in said Circuit Court,) were entitled to judgment, under the pleadings herein, against this Plaintiff in Error, solus.

4. The Court erred in deciding and holding that said Defendants in Error, (Plaintiffs in said Circuit Court,) could maintain said action against this Plaintiff in Error, upon the pleadings herein as they stood upon, and after, the entry of judgment in favor of Plaintiff in Error's original co-Defendant in this action, to wit, John F. Colburn, Executor under the Will of David Kawanakoa, Deceased.

5. The Court erred in deciding and holding that the Circuit Court for the First Circuit *Court* of said Territory correctly overruled the demurrer of this Plaintiff in Error to the declaration and complaint of said Defendants in Error, (Plaintiffs in said Circuit Court.)

6. The Court erred in deciding and holding that said Circuit Court correctly ordered, rendered and entered judgment against this declaration, upon the trial of said cause in said Circuit Court, and over the objection of this Plaintiff in Error.

7. The Court erred in deciding and holding that said Circuit Court correctly ordered, rendered and entered judgment against this Plaintiff in Error, and in favor of said Defendants in Error, (Plaintiffs in said Circuit Court.)

8. The Court erred in affirming said judgment so ordered, rendered and entered in and by said Circuit Court.

81 9. The Court erred in ordering, rendering and entering the judgment herein, dated April 30th, 1910, wherein and whereby the judgment there-to-for- ordered, rendered and entered by said Circuit Court is affirmed.

Wherefore this Plaintiff in Error prays that the judgment of said Supreme Court of the Territory of Hawaii, so ordered, rendered and entered in this cause, may be reversed.

Dated this 6th day of June, 1910.

JONAH KALANIANA'OLE,

Plaintiff in Error.

By C. W. ASHFORD,

His Attorney.

82 [Endorsed:] No. 490. In the Supreme Court for the Territory of Hawaii. George E. Smithies, Trustee, etc., et al., Defendants in Error, vs. John F. Colburn, Executor, etc., and Jonah Kalaniana'ole, Plaintiff in Error. Assignment of errors, on taking cause to U. S. Supreme Court. Filed June 7, 1910. J. A. Thompson, Clerk. Clarence W. Ashford, Attorney for Defendant in Error.

In the Supreme Court of the United States.

JONAH KALANIANA'OLE, Plaintiff in Error,

vs.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Defendants in Error.

Writ of Error to the Supreme Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, ss.:

The President of the United States to the Honorable the Justices of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court for the Territory of Hawaii, before you, or some of you, between Jonah Kalaniana'ole, Plaintiff in Error, and George E. Smithies, Trustee of Stella Keomailani Cockett,—and Stella K. Cockett, Beneficiary, Defendants in Error, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears:

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

84 then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within Sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

*Clerk of the Judiciary Department
of the Territory of Hawaii.*

Allowed this 10th day of June, 1910.

ANTONIO PERRY,

*Associate Justice, Acting as Chief Justice (in
the Absence of the Chief Justice from the
Territory) of the Supreme Court of the Ter-
ritory of Hawaii.*

[Endorsed:] No. 490. In the Supreme Court of the United States, Jonah Kalaniana'ole, Plaintiff in Error, vs. George E. Smithies, Trustee of Stella Keomailani Cockett, and

Stella K. Cockett, Beneficiary, Defendants in Error. Writ of error. Filed at 9:55 a. m. June 10, 1910. Henry Smith, Clerk Jud. Dept. Clarence W. Ashford, Attorney for Plaintiff in Error.

86 In the Supreme Court of the United States.

JONAH KALANIANA'OLE, Plaintiff in Error,

VS.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and
STELLA K. COCKETT, Beneficiary, Defendants in Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within Sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court for the Territory of Hawaii, wherein Jonah Kalaniana'ole is Plaintiff in Error, and you are Defendants in Error,—to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand nine hundred and ten.

ANTONIO PERRY,

Associate Justice, Acting as Chief Justice (in the Absence of the Chief Justice from the Territory) of the Supreme Court of the Territory of Hawaii.

[Seal Supreme Court, Territory of Hawaii.]

Attest:

J. A. THOMPSON,

*Clerk of the Supreme Court
of the Territory of Hawaii.*

87 [Endorsed:] No. 490. In the Supreme Court of the United States. Jonah Kalaniana'ole, Plaintiff in Error, vs. George E. Smithies, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary, Defendants in Error. Citation. Filed and Issued for service June 10, 1910, at 10 P. M. J. A. Thompson, Clerk. Returned June 10, 1910, at 3:10 P. M. J. A. Thompson, Clerk. Clarence W. Ashford, Attorney for Plaintiff in Error.

Service of the within Citation, by Copy, is hereby acknowledged, this 10th day of June, 1910.

ATKINSON & QUARLES,
Attorneys for Defendants in Error.

88 In the Supreme Court for the Territory of Hawaii.

GEORGE E. SMITHIES, Trustee for Stella Keomailani Cockett, et al.,
Defendants in Error.

vs.

JOHN F. COLBURN, etc., and JONAH KALANIANA'OLE, Plaintiff in
Error.

Precept to the Clerk.

To James A. Thompson, Esq., Clerk of the Supreme Court for the Territory of Hawaii.

SIR: You are hereby requested to prepare and certify, in pursuance of the Writ of Error issued in the above entitled cause, to remove the record therein to the Supreme Court of the United States,—copies of the following enumerated papers now on file herein, that is to say:

1. The Petition for a Writ of Error to issue from the Supreme Court of the Territory of Hawaii, to the Circuit Court aforesaid.

2. The Assignments of Error filed herein by said Plaintiff in Error, accompanying his Petition for a Writ of Error to the Circuit Court for the First Circuit of the Territory of Hawaii; but not including the Exhibits attached to said Assignments of Error.

3. The bond filed by Plaintiff in Error, with the Petition and assignments above mentioned.

4. The Writ of Error to the said Circuit Court, issued out
89 of the Supreme Court for the Territory of Hawaii.

5. The Return of the Clerk of said Circuit Court, to said last mentioned Writ of Error.

6. The Opinion of the said Supreme Court of said Territory, disposing of said Writ of Error.

7. The Judgment entered in and by said Supreme Court of said Territory in said cause.

8. The Petition of said Plaintiff in Error for a further Writ of Error to issue, to remove said record to the Supreme Court of the United States.

9. The Assignment of Errors accompanying the Petition last aforesaid.

10. The Order allowing such further Writ of Error, and fixing the amount of Supersedeas bond.

11. The Bond on Writ of Error, filed in pursuance of the Order last aforesaid,—the justification of sureties thereon, and the Order approving same.

12. The Citation to said defendants in Error, to appear in said

Supreme Court of the United States,—with the acknowledgment of service thereof upon and by the Attorneys for said Defendants in Error.

Dated this 24th day of June, 1910.

Yours, &c.,

C. W. ASHFORD,

Attorney for Plaintiff in Error.

Endorsed: No. 490. Supreme Court, Territory of Hawaii. George E. Smithies, Trustee for Stella Keomailani Cockett, et al., Defendants in Error, vs. John F. Colburn, etc., and Jonah Kalaniana'ole, Plaintiff in Error. Præcipe to the Clerk. Filed June 24, 1910, at 2 o'clock P. M. J. A. Thompson, Clerk.

90 In the Supreme Court of the Territory of Hawaii.

No. 490.

JONAH KALANIANA'OLE, Plaintiff in Error.

vs.

GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and STELLA K. COCKETT, Beneficiary, Defendants in Error.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII.

City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the commands of the within Writ of Error, do hereby transmit to the Supreme Court of the United States the above and foregoing transcript of record (being pages from 1 to 72 both inclusive) and do certify the same to be full, true and correct transcript of the record and proceedings had in said Supreme Court of the Territory of Hawaii in the case entitled in said Court, "George E. Smithies, Trustee of Stella Keomailani Cockett and Stella K. Cockett, Beneficiary, Defendants in Error, versus John F. Colburn, Executor under the Will of David Kawanamakoa, Deceased and Jonah Kalaniana'ole, Plaintiff in Error" as specified and recorded by the præcipe of the attorney for plaintiff in error, a copy of which is attached hereto (being pages 88 to 89 of this transcript).

I do further certify that the foregoing pages numbered from 73 to 78 both inclusive contain true and correct copies of the
91 "Petition for Writ of Error for the removal of the record to the Supreme Court of the United States and order allowing Writ of Error, fixing Supercedas bonds, etc." and "Bond on Writ of Error, the justification of sureties thereon and the order approving same," and that the original Assignment of Errors (being pages 79 to 82 both inclusive), the original Writ of Error and allowance thereof, (being pages 83 to 85 both inclusive) and the original Cita-

tion to defendants in error and acknowledgment thereof by the attorneys for said defendants in error (being pages 86 to 87 both inclusive) are hereto attached and herewith returned.

In testimony whereof I have caused the Seal of said Supreme Court of the Territory of Hawaii to be hereunto affixed, at Honolulu, City and County of Honolulu, in said Territory, this 2nd day of July, A. D. 1910.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,

Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 22,272. Hawaii Territory Supreme Court. Term No. 109. Jonah Kalaniana'ole, plaintiff in error, vs. George E. Smithies, trustee of Stella Keomilani Cockett, and Stella K. Cockett, beneficiary. Filed July 21st, 1910. File No. 22,272.

17
Office Supreme Court, U. S.
FILED.

DEC 18 1912

JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 109.

JONAH KALANIANA'OLE, PLAINTIFF IN ERROR,

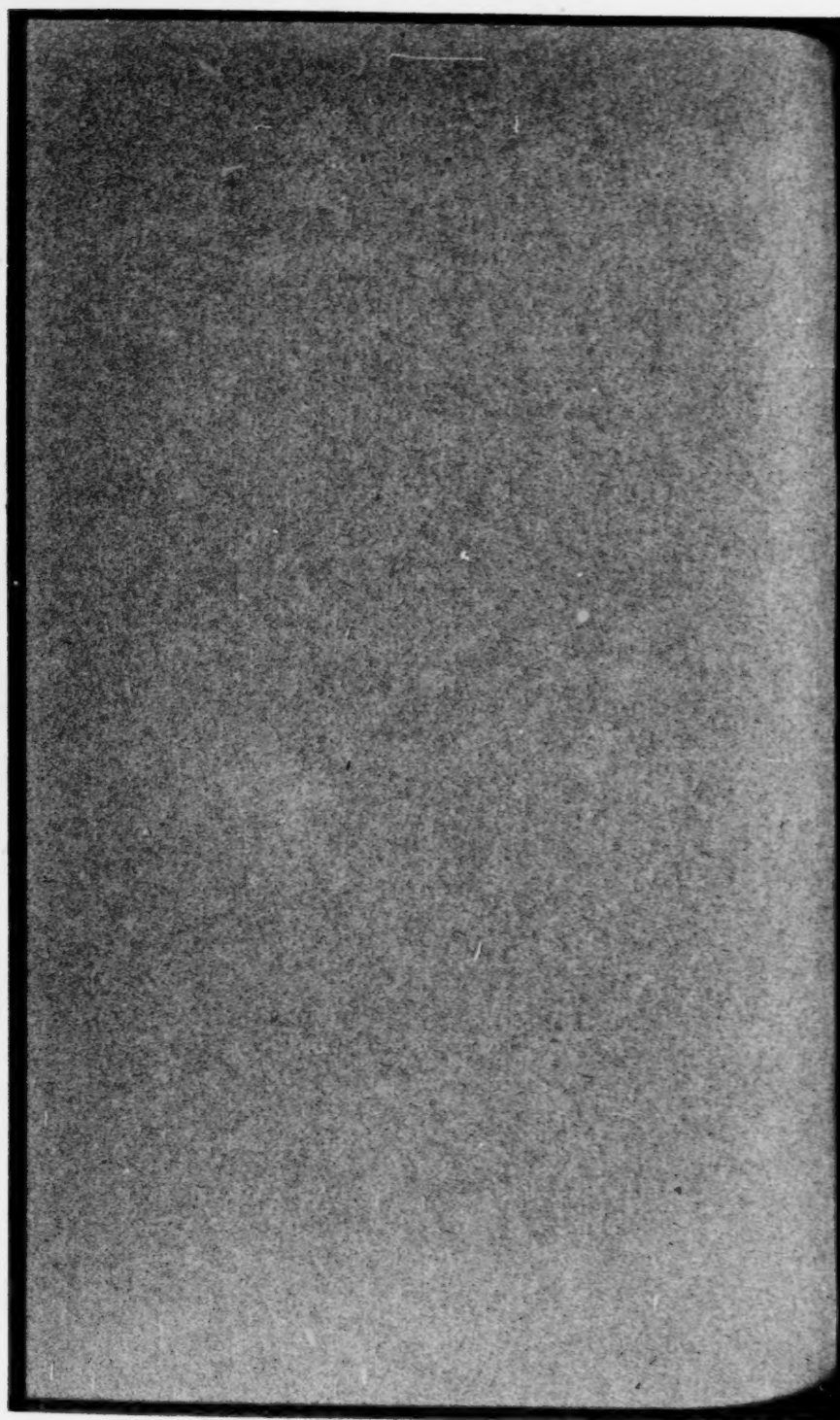
vs.

**GEORGE E. SMITHIES, TRUSTEE OF STELLA KROMAILANI
COCKETT, AND STELLA K. COCKETT, BENEFICIARY.**

**IN ERROR TO THE SUPREME COURT OF THE TERRITORY
OF HAWAII.**

BRIEF FOR PLAINTIFF IN ERROR.

C. W. ASHFORD,
Attorney for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 109.

JONAH KALANIANA'OLE, PLAINTIFF IN ERROR,

vs.

GEORGE E. SMITHES, TRUSTEE OF STELLA KEOMAILANI
COCKETT, AND STELLA K. COCKETT, BENEFICIARY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY
OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is an action at law (R. 9) brought by the defendants in error here against the present plaintiff in error, and John F. Colburn, as executor of the will of David Kawananakoa, jointly, to recover on a deficiency judgment (R. 21) for \$5,280.75 with interest from July 13, 1907, awarded against David Kawananakoa and Jonah Kalaniana'ole.

jointly, in favor of Ellen Albertina Polyblank, trustee for Stella Keomailani Cockett, and Stella K. Cockett, beneficiary, jointly. The action was begun in the Circuit Court of the First Judicial District of Hawaii, on August 3, 1900 (R., 21, 22), at which time the amount due on the judgment sued on was \$5,914.47. Judgment was given against the plaintiff in error here alone for \$6,086.15, together with costs (R., 32). This judgment was affirmed by the Supreme Court of Hawaii (R., 37-42). It is to reverse the judgment of affirmance that the present writ of error was sued out. The jurisdiction of this court rests upon the ground that the sum in controversy, exclusive of interest and costs, exceeds \$5,000 (33 Stat. L., 1035).

The material and admitted facts are as follows (R., 9-22): David Kawanamako and Jonah Kalaniana'ole were indebted in the sum of \$8,000 to the trust estate of defendant in error Cockett, of which estate Ellen Albertina Polyblank was trustee. To secure the payment of this sum the debtors executed and delivered to the trustee, in June, 1903, their joint promissory note for the amount of the debt with interest, secured by a mortgage upon certain real estate. Upon default of the mortgagors the mortgage was foreclosed, and the sale of the real estate decreed, and the decree was affirmed in this court (*Polyblank vs. Kawanamako*, 205 U. S., 349). Inasmuch as the net amount realized by the sale was less than the original debt, judgment was entered for the difference in favor of Ellen Albertina Polyblank, trustee, and Stella K. Cockett, sole beneficiary, and against David Kawanamako and Jonah Kalaniana'ole, the plaintiff in error here. The present action was begun to recover the amount awarded by this deficiency judgment. Between the date of the awarding of the deficiency judgment and the date of the institution of the present action, the trustee resigned and defendant in error, George E. Smithies, was duly appointed to succeed as trustee and accepted the trust. The deficiency judgment

was later assigned to Smithies. During the same interim David Kawanakoa, one of the two joint judgment debtors, died and John F. Colburn was duly appointed executor of the decedent's will. Thereafter Smithies presented a claim for the amount of the deficiency judgment to Colburn, as executor, and this claim was rejected by the latter. More than two months after such rejection the present action was filed, seeking to recover a joint judgment against Jonah Kalaniana'ole and John F. Colburn, executor. All the above facts are alleged in the complainant (R., 9-12) and no contest is made with respect to any of them.

The defendants below severally entered general demurrers, defendant Colburn alleging especially also that on the face of the complaint it appeared that the claim of plaintiffs below against the decedent's estate, if ever enforceable, had been barred by the statute of limitations (R., 23, 24). Colburn's demurrer was sustained (R., 26) on the ground that more than two months, the time limited by statute for actions against executors on rejected claims, had elapsed since the rejection of the claim by him and before this action was begun, and he took judgment on the order sustaining the demurrer. Kalaniana'ole's demurrer was overruled and thereupon he filed an answer (R., 28-30), under protest, contending therein that by allowing the statute of limitations to bar the claim against Colburn the plaintiffs below had released him, and giving notice that he intended to rely upon the defenses of release, payment, and the statute of limitations at the trial of the cause. The cause was submitted on a stipulated statement of facts and judgment was given against the present plaintiff in error (R., 32). This judgment was in turn affirmed by the Supreme Court of Hawaii (R., 37-42).

Assignment of Errors.

The errors assigned to sustain the reversal of the judgment of affirmance are as set out in full in the record at pages 46-47.

ARGUMENT.

A judgment is commonly designated a contract of record, and the obligation created by it, though not contractual in the sense that it arises out of the mutual assent of the judgment debtor and creditor, is contractual in its nature.

Keener, Quasi-Contracts, 16.

Louisiana *vs.* New Orleans, 109 U. S., 285, 288.

Accordingly an action *ex contractu* will lie to enforce a judgment because of the promise which the law conclusively presumes on the part of the judgment debtor to pay it, even though "the transaction in its origin was totally unconnected with contract, and there has been no promise in fact." Chitty, Contracts, 87.

The deficiency judgment on which the present action was begun is therefore in law a contract and to be construed as such. The language of the judgment sued on here is as follows (R., 21):

"It is adjudged that the complainants, Ellen Albertina Polyblank, otherwise known as Sister Albertina, trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said trust, do have and recover of and from the respondents, David Kawananaoka and Jonah Kalaniana'ole, the sum of five thousand two hundred eighty 75/100 (\$5,280.75) dollars, with interest thereon at the rate of six (6) per cent per annum from the thirteenth (13th) day of July, A. D. 1907, and that the complainants have execution therefor."

Plaintiff in error submits, first of all, that this judgment is joint, both as to obligors and as to obligees, under the general principle of construction that where two or more execute or accept an obligation such execution or acceptance

imposes upon them a joint duty or confers on them a joint right. Parsons, on Contracts (7th ed.), p. 11, states the rule as follows:

"Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right."

The joint obligees of the judgment were Ellen Albertina Polyblank, trustee, and Stella R. Cockett, beneficiary, and the joint obligors were David Kawanakoa and Jonah Kalaniana'ole. The *legal title* to the obligation created by the judgment was in the obligees jointly and the *legal obligation* itself rested upon the judgment debtors jointly. But the parties seeking to enforce the judgment in this *action at law* are George Smithies, trustee, and Stella K. Cockett, beneficiary; and the parties against whom the obligation of the judgment is sought to be enforced are John F. Colburn, executor of the will of David Kawanakoa, and Jonah Kalaniana'ole. In other words, one of the original joint obligees and one of the original joint obligors are not made parties to this action.

Plaintiff in error submits that the judgment below should be reversed because:

I. On the face of the pleadings it appears that one of the original joint obligees is not made a party plaintiff to this action at law.

II. The judgment of the trial court in favor of John F. Colburn, one of the joint defendants there, operated as a release of this plaintiff in error.

I.

The omission to join one of the two original joint obligees as a plaintiff is not a mere mistake of form but is a fatal error, going to the merits of the cause of action sued upon.

As has been pointed out above, the *legal* title to the judgment upon which this *action* is based was in Ellen Albertina Polyblank, trustee, and Stella K. Cockett, beneficiary, jointly. Inasmuch as this is an action at law to enforce a legal right, both of the legal owners of that right should have joined in bringing suit. Chitty on Pleading (10th Am. ed.), vol. 1, p. 1, states the applicable rule as follows:

"The general rule is, that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative; and therefore a correct knowledge of legal rights, and of wrongs remediable at law, will, in general, direct by and against whom an action should be brought." (Italics in the original.)

Speaking more particularly of the parties who must sue at law to enforce a contract obligation, the same author says, at pages 2-3:

"In general, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract was vested; and in general with his knowledge and concurrence, or at least, a sufficient indemnity must be tendered before his name can properly be used by the party beneficially interested. The courts of law will not, in general, notice mere equitable rights, as contradistinguished from the strict legal title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name; although the equitable right embrace the most extensive or even the exclu-

sive interest in the *benefit* to be derived from the contract or subject-matter of litigation. This rule could not be disregarded without destroying the fundamental distinction between courts of *law* and courts of *equity*, with regard to the remedy peculiar to each jurisdiction; if the *cestui que trust* were permitted to sue at law in his own name the benefits and protection intended to result from the intervention of a trustee, clothed with a legal title, might be lost, and the advantages arising from giving courts of *equity*, exclusive control over matters of trust would be defeated. Besides, it would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his legal right; and it would be highly mischievous and unjust to permit the defendant to be harassed by two actions upon the same contract or transaction. The *right of action at law* has therefore been wisely vested in the party having the strict *legal* title and interest, in exclusion of the mere equitable claim." (Italics in the original.)

From the above it is apparent that Ellen Albertina Polyblank, one of the original joint obligees, should have joined as plaintiff in this action.

The failure to join one of two joint obligees in an action at law is a fatal error sufficient to sustain a general demurrer or motion in arrest of judgment.

Chitty on Pleading (10th Am. ed.), vol. 1, p. 8.

Perry, Common-law Pleading, 135.

The latter author, adopting the language of Dicey, in his "Treatise on the Rules for the Selection of the Parties to an Action," formulates the rule thus:

"CONSEQUENCES AT COMMON LAW OF NON-JOINDER
AND OF MISJOINDER OF PARTIES.

Ex Contractu—Plaintiffs.

"Non-joinder: If it appears upon the face of the pleadings that there are other obligees, covenantee, or parties to the contract, who ought to be, but are not, joined in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error; and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it either by plea in abatement, or as a ground of non-suit on the trial upon the plea of general issue." (Italics in the original.)

In this case it appears upon the face of the complaint that a party has been omitted. The language of the complaint alleging the decree of the court awarding the deficiency judgment (R., 11) is as follows:

" * * * and said final decree did order judgment entered in favor of the said Ellen Albertina Polyblank, otherwise known as Sister Albertina, trustee as aforesaid, and Stella K. Cockett, beneficiary, for said deficiency, in the sum of five thousand two hundred eighty and 75/100 (5,280.75) dollars, with interest thereon from the thirteenth day of July, A. D. 1907, at the rate of six (6) per cent per annum."

Attached to the complaint as a part of Exhibit "A" is a copy of the deficiency judgment (R., 21), the pertinent language of which has been quoted *supra* as showing that the legal title to the judgment was in Ellen Albertina Polyblank, trustee, and Stella K. Cockett, beneficiary, jointly.

This court has held, in accordance with the practically unanimous opinion of other courts, that "one partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone against the debtor" (*Vinal vs. W. Va. Oil & Oil Land Co.*, 110 U. S.,

215). Plaintiff in error submits that the original trustee and the beneficiary were practically in the position of partners with respect to the judgment rendered in their favor jointly. Consequently the action to recover on the judgment should have been instituted by both as plaintiffs, and the beneficiary alone, or in conjunction with some one not a party to the original judgment, could not sue at law thereon.

In the case of *Gilman vs. Rives*, 10 Pet., 298, it was held, to quote from the head-note of the case, that "an action on a judgment against two defendants is not maintainable against one alone, both being alive and within the jurisdiction, and if the judgment appear by the declaration to be joint, and no excuse is stated for the non-joinder of the other debtor, the declaration is bad on demurrer." In that case plaintiff sued on a judgment against the defendant and a third party. The declaration showed on its face that the judgment sued on was joint. Defendant interposed a general demurrer. This court affirmed the judgment of the court below sustaining the demurrer. Mr. Justice Story, speaking for the court, said (pp. 299-300) :

"Generally speaking, all joint obligors and other persons bound by covenants, contract, or *quasi* contract, ought to be made parties to the suit, and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in the evidence upon trial. Thus, for instance, if one obligor be sued upon a joint bond, and upon over the bond is spread upon the record, and thereby becomes a part of the declaration, by which it appears that another person is named as a joint obligor, the party sued should not demur, but should plead in abatement that the other sealed and delivered the bond, and was in full life; for *non constat*, upon the oyer, that the other did seal and deliver the bond.

* * * *But if it should appear upon the face of the declaration, or other pleading of the plaintiff, that another sealed the bond jointly with the defendant, and that both are still living, the court will arrest the judgment, and the objection may be taken on demurrer: because the plaintiff himself shows that another ought to be joined, and it would be absurd to compel the defendant to plead facts which are already admitted.*" (Italics ours.)

If a declaration which shows on its face that another is bound jointly with the defendant is bad on general demurrer, *i. e.*, bad in substance, it is difficult to conceive of any reason why a declaration which shows on its face that another is entitled to enforce the right sued on jointly with the plaintiff, is not likewise defective in substance. This case stands, practically speaking, upon complaint and demurrer. The answer of the defendant below (plaintiff in error here), after his demurrer was overruled, set up no new facts, but merely stated more in detail one of the grounds alleged to sustain the demurrer. And the court, in reaching its decision, found that there was no dispute whatsoever as to the material facts involved. Indeed, the only allegation of the complaint to which plaintiff in error took exception was the allegation that his codefendant, the executor of David Kawananakoa, rejected defendants' in error claim "arbitrarily and unjustly," an allegation obviously of no legal significance in this action.

II.

The decision of the court awarding judgment in favor of Colburn, executor of one of the co-obligors and one of the joint defendants in the trial court, operated to release this plaintiff in error. The obvious theory upon which the complaint was drafted was that the defendants named therein were jointly liable. The original indebtedness to the trust estate is pleaded as a joint one (R., 9). The note and mortgage

are likewise pleaded (R., 9). So also with the deficiency judgment sued on (R., 11). The prayer for judgment (R., 12) is also for a joint judgment against the defendants named in the complaint. The judgment in favor of one of the defendants, therefore, upset the whole theory upon which the suit was brought, and thereafter judgment should not have been entered against one of the joint defendants alone, on the familiar principle that the release of one co-obligor releases the other.

But even should this contention be overruled it is submitted that defendants in error, having failed to prosecute their claim against the decedent obligor's estate, have so prejudiced this plaintiff in error that he should not be called upon to respond *solus*. If it be claimed that the obligation of the deficiency judgment survived to the plaintiff in error alone, the answer is that while this may be the situation at law, in equity the obligees could and should have reached the estate of the deceased co-obligor.

In *Pickersgill vs. Lahens*, 15 Wall., 140, 143-144, this court, through Mr. Justice Davis, said:

"The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as joint liability. If through fraud, ignorance, or mistake the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake, or want of skill, failed to accomplish their object."

To like effect are the following:

Cox vs. Maddox, 72 Ind., 206.

Barnes vs. Brown, 130 N. Y., 372.

Hengst's Ap., 24 Pa., 413.

The allegation of indebtedness is that "David Kawanana-kou and Jouch Kahugiamale became indebted to said trustee and to said trust estate in the sum of eight thousand (\$8,000) dollars" (R., 9). The reasonable presumption is that both debtors participated in the loan and that each secured a share of the money for his separate use. Consequently the case falls within the principle laid down by this court in the quotation *supra* and the defendants in error (plaintiffs in the trial court) could and should have reached the estate of the deceased co-obligor and have imposed upon it its *pro rata* share of the burden of the debt. Their failure to do this has resulted in putting this plaintiff in error at a serious disadvantage. Judgment was entered in this case against this plaintiff in error *solus* in the trial court on January 28, 1910 (R., 32). The executor of the deceased co-obligor's estate was regularly discharged by order of court in the following month, the estate having been completely settled (R., 4). If all probability the assets of the estate had been dissipated some time previous to the date of discharge. The result is that this plaintiff in error must pay the entire judgment without any right of contribution, and all this because of the failure of these defendants in error to reach the estate of the deceased co-obligor in equity and make it share its *pro rata* portion of the debt. In view of this situation plaintiff in error submits that the most that defendants in error are entitled to against him, if they are entitled to anything at all, is one-half of the amount of the debt and judgment with interest.

This latter argument should obviously control the decision of this case even should the court decide that section 1730 R. L. of Hawaii permitting an assignee to sue in his

own name and right at law renders the former argument futile, because that same section provides that such suit by the assignee is subject "to all equities and set-offs existing in favor of the party liable against the assignor and which existed at the time of the assignment or at any time thereafter until notice thereof was given to the party liable."

It is respectfully submitted that the judgment below should be reversed.

C. W. ASHFORD,
Attorney for Plaintiff in Error.

[19559]



FILED.

DEC 18 1912

JAMES H. MCKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1912

No. 109

JONAH KALANIANA'OLE, PLAINTIFF IN ERROR,

vs.

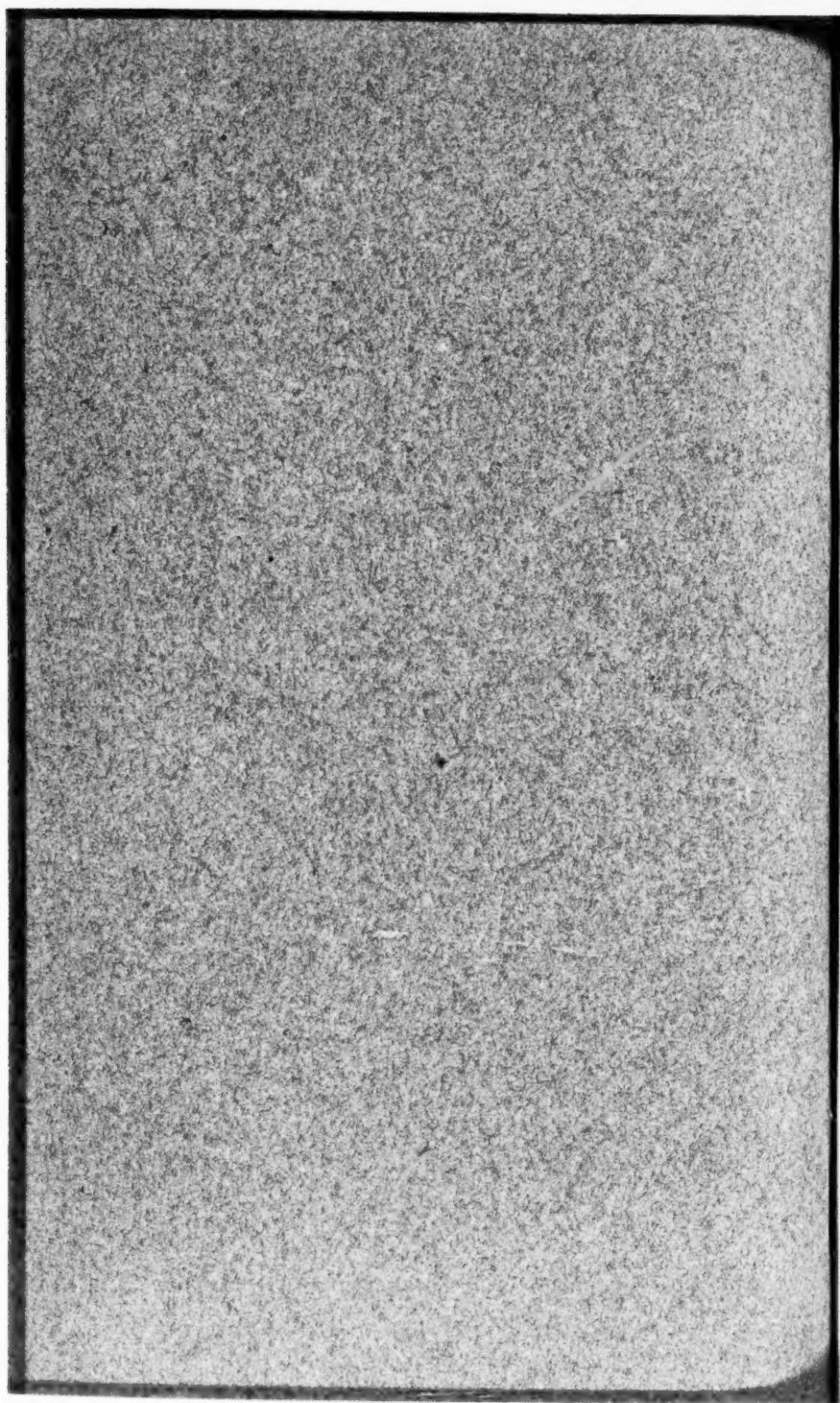
GEORGE E. SMITHIES, TRUSTEE OF STELLA KEOM-
AILANI COCKETT AND STELLA K. COCKETT,
BENEFICIARY.

Error to the Supreme Court of the Territory of Hawaii

Brief for Defendant in Error (PLAINTIFF BELOW)

A. L. C. ATKINSON and
RALPH P. QUARLES,

Attorneys for Defendants in Error.



Supreme Court of the United States

OCTOBER TERM, 1912

No. 109

JONAH KALANIANA'OLE, PLAINTIFF IN ERROR,

v.

GEORGE E. SMITHIES, TRUSTEE OF STELLA KEOM-
MILANI COCKETT AND STELLA K. COCKETT,
BENEFICIARY.

Error to the Supreme Court of the Territory of Hawaii

Brief for Defendant in Error (PLAINTIFF BELOW)

The writ of error in this case is based, solely and entirely, upon a technicality. It is claimed on behalf of the plaintiff in error that, foresooth, the personal representative of the deceased co-obligor of plaintiff in error, viz. John F. Colburn, Executor under the will of David Kawanānākoa, deceased, was joined as a defendant in the action, and his demurrer was sustained, and a judgment dismissing him as a party defendant was entered, that the action must necessarily fall as to the plaintiff in error. It is upon this ground principally that the plaintiff in error asks a reversal of the judgment, which was affirmed by the Supreme Court of the Territory of Hawaii. It is true that after the death of Kawanānākoa a verified claim was presented to his executor upon the claim to recover which this action was brought in the Circuit Court of the First Circuit of Hawaii. It is also true that

the defendants in error admitted the demurrer filed by said personal representative of Kawananakoa, by failing to join in said demurrer, and the said action was dismissed (Printed Transcript, pp. 24 to 28) as to said personal representative of Kawananakoa. This left the action pending in the Trial Court against Kalaniana'ole, plaintiff in error, whose demurrer to the complaint of defendants in error was overruled by the Court (Printed Transcript, p. 33).

At the hearing of the cause in the Trial Court plaintiff in error admitted all of the facts stated in the complaint (Printed Transcript, p. 34), with the exception of one immaterial fact.

The demurrer of Kalaniana'ole, plaintiff in error, which was general in its nature, was based on the ground that the complaint did not state facts sufficient to constitute a cause of action against plaintiff in error, *solus*; nor against him jointly with the personal representative of Kawananakoa (Printed Transcript, p. 23).

The answer of Kalaniana'ole (Printed Transcript, pp. 28, 29, 30) consists of matters which should only be presented by demurrer and a plea of the statute of limitations; in that the defendant in error having released the personal representative of the deceased co-obligor or judgment debtor by failing to sue within time, plaintiff in error was also released by operation of law. Said answer consists of argument and conclusion, and a reiteration of facts set forth in the complaint, until we reach the 4th paragraph of the answer, which consists of a general denial, the effect of which was overcome by the said stipulation.

The first assignment of error in this Court on behalf of the plaintiff in error, that the Plaintiff George E. Smithies, Trustee, could not join with his beneficiary in bringing the suit, raises a question which was not raised, either by the demurrer of the plaintiff in error (Trans. p. 23), by his answer (Trans. pp. 28, 29, 30) or by the assignments of error of the plaintiff in error in the Supreme Court of the Territory of Hawaii (Trans. pp. 3 to 6 inclusive), and for that reason should not be considered here. It is interesting to note, as history of the case, that the trustee and the beneficiary both joined in the original action to foreclose, and which was appealed to this Court and dismissed

(200 U. S. 606), and afterwards brought up on writ of error and decided adversely to the plaintiff in error (205 U. S. 349). In all of the litigation growing out of the subject matter of this action, this is the first time this question has been raised.

The second, third, fourth, fifth, sixth, seventh, eighth and ninth assignments of error (Trans. p. 47) all raise the same question, and, when analyzed, amount to an invocation of the rule of law, contended for by plaintiff in error, that the death of one of the judgment debtors released the other judgment debtor, and a suit, *solus*, against the surviving judgment debtor, could not be maintained. He contends, therefore, that it was error to overrule the demurrer of the plaintiff in error, Kalaniana'ole; error to give judgment in favor of the defendants in error; and the action of the Supreme Court of the Territory of Hawaii in affirming that judgment, was error. All of these assignments of error raise the one question, and none other, that the action could not be maintained against Kalaniana'ole after the death of Kawananakoa, especially after defendants in error had presented a claim against the personal representative of the deceased co-obligor, Kawananakoa, which had been rejected, and no suit brought thereon within two months—whereby the action became barred by limitation against the personal representative of Kawananakoa, and which resulted in the discharge of plaintiff in error by operation of law.

This is, in effect, the only question in the case. This question, we think, is satisfactorily answered by the opinion of the Supreme Court of the Territory of Hawaii, delivered by the late able Chief Justice Hartwell (Trans. pp. 38-42), and the authorities therein cited.

Where one of two joint obligors is relieved by operation of law, the other is not released unless the ground of such release is applicable alike to the other. A defense available to one joint obligor only (in this case that of death) does not release his co-obligor.

2 Chit. Pl. 455;

2 Chit. Contr. 1176;

Hunt v. Terrill's Heirs, 30 Ky., 681.

Phillips v. Ward, 2 H. & C., 710;
 Hartness v. Thompson, 5 Johns., 160;
 Hill v. Morse, 61 Me., 541;
 Harriman, Contr. Secs. 353, 354.

After the death of the co-obligor, Kawanakoa, his personal representative was not bound, but the surviving obligor, Kalaniana'ole, plaintiff in error, alone remained bound.

2 Chit. Pl. 58;
 3 Williams on Executors, 1842;
 2 Chit. Contr. 1356;
 Harrison v. Magoon, 13 Haw., 330, 353;
 Bishop Contr., Sec. 683.
 Ashbee v. Pidduck, 1 M. & W., 504.

Improvidently suing plaintiff in error jointly with the executor of his deceased co-obligor, did not release the former. This mistake could not defeat the action, and the judgment was proper.

Dunoi v. New York, 76 N. Y. Sup., 161, 164.
 11 Enc. Pl. & Pr., 850.

We respectfully ask that the judgment of the Supreme Court of the Territory of Hawaii herein be affirmed.

A. L. C. ATKINSON.

RALPH P. QUARLES.

Attorneys for Defendants in Error.

46, 93. *McGilvra v. Ross*, 215 U. S. 70, 79.

Decree affirmed.

KALANIANAOLE *v.* SMITHIES, TRUSTEE OF
COCKETT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

No. 109. Argued December 20, 1912.—Decided January 6, 1913.

On a pure matter of form as to the parties in a suit coming here from a court of a Territory, and where the whole interest in a judgment sued upon was before that court, this court should not go behind the local practice.

A joint judgment ceases to be joint by the death of one of the parties. Where the joinder of an executor of a party whose interest has ceased is simply a mistake, it is not reversible error.

20 Hawaii, 138, affirmed.

THE facts are stated in the opinion.

Mr. C. W. Ashford, for plaintiff in error, submitted.

Mr. Ralph P. Quarles, with whom *Mr. A. L. C. Atkinson* was on the brief, for defendants in error.

226 U. S.

Opinion of the Court.

Memorandum opinion by direction of the court. By
MR. JUSTICE HOLMES.

This is a suit on a deficiency judgment rendered upon foreclosure of the mortgage that was under consideration in *Kawananakoa v. Polyblank*, 205 U. S. 349. The judgment was in favor of Polyblank, Trustee, and Cockett, sole beneficiary, against Kawananakoa and the plaintiff in error, Kalaniana'ole. Before the present suit was begun the trustee resigned, Smithies was duly appointed successor in the trust and the former trustee assigned the judgment to him. Smithies and his beneficiary then brought this action against the plaintiff in error and the executor of Kawananakoa who had died. The executor demurred and had judgment. The plaintiff in error then answered, setting up the discharge of the executor and that the plaintiffs allowed the claim against the latter to be barred by time before bringing suit. The case was heard upon mutual admissions of the facts set up in the declaration and answer. In argument the plaintiff in error also objects that only the original judgment creditors could sue. Both objections were sufficiently answered in the court below. That as to the plaintiffs is pure matter of form, on which we should not go behind the local practice. The whole interest in the judgment was before the court. As to the second, the judgment was sued upon as a joint judgment, but it ceased to be joint by the death of one of the parties bound, as is the nature of joint obligations. *Edsar v. Smart*, T. Raym. 26; Y. B. 3 ed. 3, 11, pl. 37. See 2 Vernon, 99. The joinder of the executor was simply a mistake that did no harm. See *Bierce v. Hutchins*, 205 U. S. 340, 347.

Judgment affirmed.